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1038

No. 2843

United States

Circuit Court of Appeals

For the Ninth Circuit.

MOORE FILTER COMPANY, a Corporation,
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the District Court of the United States, in and for the Northern District of California, Second Division.

JOHN L. TAUGHER,

Plaintiff,

vs.

THE MOORE FILTER COMPANY (a Corporation),

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That the plaintiff is a citizen of the State of California, residing in the City and County of San Francisco, State of California, and during all the times herein mentioned was and now is a duly qualified and licensed attorney and counselor at law, licensed as such under the laws of the State of California.

II.

That the defendant, The Moore Filter Company, is a corporation organized and existing under the laws of the State of Maine and having its principal place of business at the City of Portland in said State, and is a citizen of the State of Maine. The said defendant also does business in the State of California and has an agent in the City and County of San Francisco, State of California.

III.

That the amount in controversy herein exclusive of

interest and costs exceeds the sum of Three Thousand Dollars.

IV.

That between the first day of March, 1913, and the eighteenth day of August, 1913, at the special instance and request [1*] of The Moore Filter Company, plaintiff rendered and performed work and service to and for the defendant, The Moore Filter Company, as follows:

Services and expenses in and about and in connection with negotiations looking to the settlement of certain claims of The Moore Filter Company against various mining companies located in Australia and elsewhere, which mining companies were represented by Messrs. Bewick, Moreing & Company, of London, England; and services in connection with the negotiations in London, England, with Bewick, Moreing & Company, and the solicitors and legal adviser of said company, in relation to such claims for damages for infringement by such mining companies of the rights of The Moore Filter Company under certain patents issued by the Government of Australia, and negotiations with relation to the future use of such patent rights in Australia by such mining companies, and as to the formation of a company to take over the patent rights of the Moore Filter Company in Australia, and the procuring of various mining companies of Australia as subscribers for stock therein, and the like.

Services and expenses in and about and in connection with negotiations by the plaintiff in London,

*Page-number appearing at foot of page of original certified Record.

England, with Mr. Milner looking to the settlement of claims of The Moore Filter Company against certain mining companies in South Africa for damages for infringement by such mining companies of the rights of The Moore Filter Company under certain patents owned by it covering the right to the use of certain processes in South Africa; negotiations looking to a settlement concerning the future use by such South African mining companies of said processes, and of the organization of a company to take over the rights of The Moore Filter Company under such patents in South Africa. [2]

Services in connection with negotiations with Mr. McDermott looking to a formation of such company and a settlement of various disputes between The Moore Filter Company and other companies using such processes, or some of them, of The Moore Filter Company.

Services and expenses in and about and in connection with the negotiating of a settlement of the claim of The Moore Filter Company against the Buffalo Mines Company, Limited, for damages for infringement by the Buffalo Mines Company, Limited, of the rights of The Moore Filter Company under certain patents issued by the Canadian government and owned by The Moore Filter Company, and the payment of royalties by the Buffalo Mines Company Limited, for future use in Canada of such processes. These negotiations resulted in an agreement whereby the Buffalo Mines Limited agreed to pay the sum of about Three Thousand Dollars ($3,000) for past in-

fringement and an agreement to pay a certain sum by way of royalties on each ton of ore thereafter treated by said company by the processes covered by such patents.

Services and expenses in connection with an incident to a journey by plaintiff from New York to Washington, D. C., to engage counsel, then in Washington, for certain actions which The Moore Filter Company intended bringing against certain large infringers in Nevada and elsewhere for sums aggregating many thousands of dollars.

Services rendered in and about and in connection with negotiations and with the settlement of certain claims of The Moore Filter Company against the Golden Cycle Mining Company, a corporation organized under the laws of West Virginia, and carrying on business in Colorado, and elsewhere, which negotiations finally terminated in a payment by the Golden Cycle Mining Company to The [3] Moore Filter Company of Fifty Thousand Dollars ($50,000) damages for infringement of such patent rights, and a confession of judgment of infringement thereof, and the granting and conveying of certain other valuable considerations by the Golden Cycle Mining Company to The Moore Filter Company.

That the plaintiff and defendant entered into a special contract relating to plaintiff's remuneration for part of such services in relation to the claim of The Moore Filter Company against the Golden Cycle Mining Company and in said special contract it was and is provided that the said plaintiff was to be entitled to receive, hold and have for his own use and

benefit for his services in connection therewith, twenty per cent (20%) of all moneys agreed to be paid and paid to The Moore Filter Company by the Golden Cycle Mining Company by way of settlement and compromise of such claims, and a copy of a memorandum of such agreement and the terms thereof signed by George Moore, President of the defendant, The Moore Filter Company, and for and on behalf of said company, is hereby annexed and marked exhibit "A." That such special contract has been performed and completed.

That plaintiff performed other valuable services in connection with the claim of The Moore Filter Company against the Golden Cycle Mining Company whereby the Golden Cycle Mining Company confessed judgment of infringement, and the Golden Cycle Mining Company rendered certain other valuable considerations to The Moore Filter Company through the efforts and services of the plaintiff, for which services the defendant, The Moore Filter Company, is still indebted to the plaintiff.

That the reasonable value of the services so rendered including plaintiff's traveling, hotel and incidental expenses [4] in and about and in connection therewith is the sum of Twenty-six Thousand One Hundred Dollars ($ 26,100), no part of which has been paid except the sum of Ten Thousand Dollars ($10,000), paid under and by way of satisfaction of the special contract hereinabove mentioned, and the further sum of Two Thousand Five Hundred ($2,500) Dollars, leaving a balance still owing to the

plaintiff from the defendant of Thirteen Thousand Six Hundred ($13,600) Dollars.

That for a separate and second cause of action plaintiff complains of defendant and alleges:

I.

That the plaintiff is a citizen of the State of California, residing in the City and County of San Francisco, State of California, and during all the times herein mentioned was and now is a duly qualified and licensed attorney and counselor at law, licensed as such under the laws of the State of California.

II.

That the defendant, The Moore Filter Company, is a corporation organized and existing under the laws of the State of Maine and having its principal place of business at the City of Portland in said State, and is a citizen of the State of Maine. The said defendant also does business in the State of California and has an agent in the City and County of San Francisco, State of California.

III.

That between the 18th day of August, 1913, and the 10th day of December, 1913, the plaintiff was engaged in the services of, and has rendered services to the defendant, as a director and as president of The Moore Filter Company, and between said dates rendered and performed work and services to and for the defendant, The Moore Filter Company.

That the reasonable value of such services so rendered [5] is the sum of Four Thousand ($4,000) Dollars, no part of which has been paid, and there is now due, and owing by the defendant to the plain-

tiff therefor the sum of Four Thousand ($4,000) Dollars.

That for a separate and third cause of action plaintiff complains of defendant and alleges:

I.

That the plaintiff is a citizen of the State of California, residing in the City and County of San Francisco, State of California, and during all the times herein mentioned was and now is a duly qualified and licensed attorney and counselor at law, licensed as such under the laws of the State of California.

II.

That the defendant, The Moore Filter Company, is a corporation organized and existing under the laws of the State of Maine and having its principal place of business at the City of Portland in said State, and is a citizen of the State of Maine. The said defendant also does business in the State of California and has an agent in the City and County of San Francisco, State of California.

III.

That between the 28th day of August, 1913, and the 25th day of October, 1913, the plaintiff, while acting as president of the said company, at its instance and request paid out and expended for the benefit of the defendant company, the sum of Seven Hundred and Fifty-eight ($758) Dollars; no part of said sum has been paid back to the plaintiff and there is now due and owing to the plaintiff from defendant therefor the sum of Seven Hundred and Fifty-eight ($758) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant [6] for the sum of Fourteen Thousand One Hundred ($14,100) Dollars, and for the further sum of Four Thousand ($4,000) Dollars, and for the further sum of Seven Hundred and Fifty-eight ($758) Dollars, and for the costs and disbursements of this action.

J. L. TAUGHER,
Plaintiff.

United States of America,
Northern District of California,—ss.

John L. Taugher, being first duly sworn, deposes and says, that he is the plaintiff in the foregoing entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. L. TAUGHER.

Subscribed and sworn to before me, this 22d day of January, 1915.

[Seal] J. A. SCHAERTZER,
Deputy Clerk, U. S. District Court, Northern District of California. [7]

Exhibit "A."

Colorado Springs, Colo., August 5, 1913.

THIS IS TO CERTIFY that under the terms of and in pursuance of a certain agreement of hiring, heretofore made by The Moore Filter Company through and by me as president thereof with J. L. Taugher, the said J. L. Taugher is entitled to re-

ceive, hold and have for his own use and benefit for his services heretofore rendered and performed under said agreement, twenty (20%) per cent of all moneys to be paid and agreed to be paid to The Moore Filter Company by the Golden Cycle Mining Company by way of settlement and compromise of the claims of The Moore Filter Company against The Golden Cycle Mining Company, for the unauthorized use by said mining company of certain rights and processes of The Moore Filter Company under certain Letters Patent of the United States as well as for the license or grant of right to said mining company to use such process in the future.

(Signed) GEORGE MOORE,
President.

[Endorsed]: Filed Jan. 22, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

Summons.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

JOHN L. TAUGHER,
Plaintiff,

vs.

THE MOORE FILTER COMPANY (a Corporation),
Defendant.

Action brought in said District Court, and the Complaint filed in the office of the clerk of said District Court, in the City and County of San Francisco.

J. L. TAUGHER,
In *pro per.*,
Plaintiff Attorney.

The President of the United States of America, Greeting: To The Moore Filter Company, Defendant:

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this twenty-second day of January, in the year of our Lord, one thousand nine hundred and fifteen, and of our independence the one hundred and thirty-ninth.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [9]

United States Marshal's Office,
Northern District of California.

I HEREBY CERTIFY, that I received the within writ on the 22d day of Jan., 1915, and personally served the same on the 22d day of January, 1915, upon The Moore Filter Company, a corporation, by delivering to, and leaving with E. L. Oliver, agent and general manager, of The Moore Filter Company, a corporation.

Said defendant named therein personally at Room 706, Hooker & Lent Building, 503 Market Street, City and County of San Francisco, in said district, a certified copy thereof, together with a copy of the Complaint, attached thereto.

J. B. HOLOHAN,
U. S. Marshal.
By I. W. Grover,
Office Deputy.

San Francisco, January 22d, 1915.

[Endorsed]: Filed Jan. 26, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,
Plaintiff,
vs.
THE MOORE FILTER COMPANY, a Corporation,
Defendant.

United States Marshal's Amended Return of Service of Summons.

I hereby certify that I received the within Summons on the 22d day of January, 1915, and that I personally served same upon The Moore Filter Company, the defendant, on the 22d day of January, 1915, in the City and County of San Francisco, in the Northern District of California, by then and there delivering to and leaving with E. L. Oliver, the business agent of the Moore Filter Company in California, a true copy of said summons attached to a true copy of the complaint filed in this action;

That the defendant, The Moore Filter Company, is a corporation organized under the laws of Maine, doing business in the State of California and in the Northern District thereof, having a business agent therein, and said E. L. Oliver is the business agent of the Moore Filter Company in California, and he is also the managing agent of the Moore Filter Company in California.

J. B. HOLOHAN,
U. S. Marshal,
By I. W. Grover,
Office Deputy.

[Endorsed]: Filed Feb. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

MOORE FILTER COMPANY (a Corporation),

Defendant.

Answer.

Now comes the defendant the Moore Filter Company and without waiver of its objections that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it or over the subject matter of this action, which said objections and the several benefits thereof are specifically reserved to it, and also specifically reserving all of its rights under motion to quash service of summons in this action, heretofore made by it and denied by this Court, said defendant makes answer and says:

First. Denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph or subdivision of the complaint therein marked or designated "I," and basing its denial on that ground denies each and every allegation contained in said paragraph of said complaint.

Second. Answering paragraph "II" of said complaint, defendant admits that it is a foreign corpora-

tion organized under the laws of the State of Maine and denies each and every other allegation contained therein.

Third. Denies, upon information and belief, each and every allegation contained in the paragraph or subdivision of said complaint therein marked or designated "III."

Fourth. Denies each and every allegation contained in the paragraph or subdivision of said complaint therein marked or **[12]** designated "IV."

Fifth. Denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraph or subdivision of the second cause of action of plaintiff's complaint therein marked or designated "I," and basing its denial on that ground denies each and every allegation contained in said paragraph of said complaint.

Sixth. Answering the allegations contained in paragraph of subdivision "I" of plaintiff's second cause of action, defendant admits it is a foreign corporation organized under the laws of the State of Maine, and denies each and every other allegation contained in said paragraph.

Seventh. Answering paragraph "III" of plaintiff's second cause of action, defendant admits that plaintiff was at one time president and a director of defendant, and denies each and every other allegation in said paragraph contained.

Eighth. Defendant denies that it has any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraph or

subdivision of plaintiff's third cause of action therein marked and designated "I," and basing its denial on that ground denies each and every allegation contained in said paragraph of said complaint.

Ninth. Answering the paragraph or subdivision of plaintiff's third cause of action therein marked or designated "II," defendant admits that it is a foreign corporation organized under the laws of the State of Maine, and denies each and every other allegation in said paragraph or subdivision contained.

Tenth. Denies that it has any knowledge or information thereof sufficient to form belief as to the allegations contained in the paragraph or subdivision of plaintiff's third cause of action therein marked or designated "III," and basing its denial on that ground denies each and every allegation contained in said **[13]** paragraph of said complaint.

Further answering the complaint of the plaintiff and each and every of the three causes of action therein set forth, saving and reserving nevertheless the objections and exceptions hereinbefore stated, the defendant alleges:

Eleventh. That heretofore and before the commencement of this action this defendant fully satisfied and discharged the plaintiff's claims, and each of them, by payment to said plaintiff of the full amounts due thereon.

Further answering the complaint of the plaintiff and each and every of the three causes of action therein set forth, saving and reserving nevertheless the objections and exceptions hereinbefore stated, and by way of counterclaim, the defendant alleges:

Twelfth. That at all of the times hereinafter mentioned the defendant was and now is a corporation duly created, organized and existing under and by virtue of the laws of the State of Maine.

Thirteenth. That at all of the times hereinafter mentioned between the 16th day of August, 1913, and the 9th day of December, 1913, the plaintiff was a director of the defendant corporation, and at all times between the 19th day of August, 1913, and said 9th day of December, 1913, said plaintiff was President of the defendant corporation.

Fourteenth. That heretofore and on or about the 27th day of August, 1913, at a meeting of the board of directors of the defendant corporation held in the City and State of New York, at which meeting the above-named plaintiff was present and participated the said directors of the said corporation adopted a resolution, voted for all of the directors including the plaintiff, whereby they transferred and assigned, or attempted to transfer and assign and directed the payment of the sum of Ten Thousand Dollars **[14]** ($10,000) to the plaintiff in satisfaction of a pretended indebtedness to said plaintiff by this defendant, and that the aforesaid alienation, assignment and payment were wrongful and contrary to law, and a breach of trust reposed in the plaintiff and of his duty to this defendant corporation in the premises.

Fifteenth. That thereafter and on or about the 29th day of August, 1913, the plaintiff, at the City of New York, in pursuance of the wrongful plan and purpose aforesaid, withdrew from the treasury

of the defendant corporation and caused said defendant to pay to him the sum of Twelve Thousand Five Hundred Dollars, ($12,500) in satisfaction of the pretended indebtedness of this defendant to said plaintiff; and that said plaintiff has ever since retained and still retains said sum and has converted the same to his own use, and that the withdrawal, payment and retention of said sum by the plaintiff was wrongful and illegal and a breach of the trust reposed in him, and of his duty to the corporation defendant in the premises.

Sixteenth. That this defendant was not, at the time of the payments aforesaid, nor at any other time indebted to the plaintiff in the sum of Twelve Thousand Five Hundred Dollars ($12,500), and on the contrary, that the total actual and *bona fide* indebtedness of the defendant to the plaintiff upon all lawful claims against it, did not exceed the sum of Five Thousand Dollars ($5,000) in the aggregate, and that the assertion of a claim for the larger amount above stated, by the plaintiff, was a mere pretense and sham to enable said plaintiff to possess himself of the defendant's property and assets and to convert the same to his own use, and was and is wrongful and illegal and a breach of the plaintiff's duty to this defendant in the premises.

Seventeenth. That heretofore and before the commencement of this action this defendant disaffirmed the wrongful acts of the [15] plaintiff in the premises, and demanded of plaintiff that he repay to it the sum of Seven Thousand Five Hundred Dollars ($7,500) with interest thereon from De-

cember 9, 1913, and no part thereof has been paid or satisfied and the whole amount thereof is now due and owing from the plaintiff to this defendant.

Eighteenth. That the matters hereinabove set forth arise out of the same transactions set forth in the complaint as the foundation of the plaintiff's claims and are connected with the subject of this action.

WHEREFORE, the defendant prays judgment, that the plaintiff take nothing, and that the court give judgment against said plaintiff, and in favor of said defendant in the sum of Seven Thousand Five Hundred Dollars ($7,500) together with interest thereon from the 9th day of December, 1913, and that defendant recover its costs herein.

SCOTT HENDRICKS,
Attorney for Defendant. **[16]**

State of California,
City and County of San Francisco,—ss.

Scott Hendricks, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled action; that the defendant is a corporation and does not reside in the said city and county, and does not have its office and principal place of business in the city and county where its attorney resides; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters that he believes it to be true.

SCOTT HENDRICKS.

Subscribed and sworn to before me on this the 19th day of October, A. D., 1915.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within Answer is hereby admitted this 19th day of October, 1915.

J. L. TAUGHER,

Plaintiff.

[Endorsed]: Filed Oct. 19, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[17]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

THE MOORE FILTER COMPANY, a Corporation,

Defendant.

Plaintiff's Answer to Defendant's Counterclaim.

Comes now the plaintiff, John L. Taugher, and for answer to the counterclaim of the defendant herein says:

I.

Answering the thirteenth paragraph or subdivision of defendant's answer and counterclaim, he admits that between the 18th day of August, 1913,

and the 10th day of December, 1913, the plaintiff was a director of the defendant corporation, and that between the 19th day of August, 1913, and the 10th day of December, 1913, plaintiff was the president of defendant corporation.

II.

Answering the fourteenth paragraph or subdivision of defendant's answer and counterclaim, plaintiff admits that he was present at a meeting of the board of directors of defendant corporation held in the City and State of New York on or about the 27th day of August, 1913, at which meeting the said directors of said corporation adopted a resolution whereby they transferred and assigned or directed the payment of the sum of ten thousand dollars to John L. Taugher, who is the plaintiff herein, but this plaintiff denies that said payment was in satisfaction of a merely pretended indebtedness of the defendant to this plaintiff, and he denies that the said alienation, **[18]** assignment or payment, was wrongful or contrary to law, or that it was a breach of trust reposed in the plaintiff or a breach of his duty to the defendant corporation, in the premises, or otherwise, but on the contrary plaintiff alleges that such resolution, whereby the said directors transferred and assigned or directed the payment of the sum of $10,000 to the plaintiff, was legal and proper and the payment of said $10,000 was intended to be and was a partial payment and satisfaction of a legitimate and proper indebtedness of the Moore Filter Company to John L. Taugher, this plaintiff, and such resolution was

duly and properly passed at a meeting of the board of directors of said corporation, a copy of which resolution, together with the minutes of said meeting, is attached hereto and made a part hereof, and marked exhibit "B."

III.

Answering the fifteenth paragraph or subdivision of defendant's answer and counterclaim, this plaintiff admits that thereafter and on or about the 28th day of August, 1913, the plaintiff withdrew from the treasury of the defendant company, or caused said defendant to pay him the sum of $10,000, in pursuance of the authorization of the board of directors contained in said resolution but not otherwise, and plaintiff further admits that prior, but not subsequent to said date, to wit, on or about the 20th day of August, 1913, he received the sum of $2,500 from The Moore Filter Company in partial satisfaction of an indebtedness of the Moore Filter Company to the said John L. Taugher, existing prior to the 20th day of August, 1913, and which indebtedness was contracted by the Moore Filter Company some months prior thereto, which said $2,500 is mentioned on lines 5 and 6, of page 5, of plaintiff's complaint herein, and for which payment due credit was given by the plaintiff to the defendant, but this plaintiff denies that said payments to him of $2,500 and $10,000 were in pursuance of any wrongful plan or purpose whatsoever, and denies that the payment of said sums, or [19] either or both of them, to the plaintiff, or the retention of said sums, or either or both of them, by the

plaintiff, was wrongful or illegal, or a breach of any trust reposed in him, or a breach of his duty to The Moore Filter Company, but on the contrary plaintiff alleges that the payment to him of the sum of $2,500, and of the further sum of $10,000, were just and proper payments to him on account of the indebtedness of The Moore Filter Company to him the said John L. Taugher, and this plaintiff denies that he received the sum of $12,500, mentioned in the fifteenth paragraph of defendant's answer and counterclaim, or any part thereof other than is herein set forth.

IV.

Answering the sixteenth subdivision or paragraph of defendant's answer by way of counterclaim, this plaintiff alleges that the defendant was at the time of the payments therein mentioned indebted to this plaintiff in a much greater sum than the sum of $12,500, and this plaintiff denies that the total, actual or *bona fide* indebtedness of the defendant, The Moore Filter Company, to the plaintiff, John L. Taugher, upon the lawful claims held against them, did not exceed the sum of $5,000 in the aggregate, and denies that the assertion of a claim for the larger amount above stated by the plaintiff was a mere pretense or sham to enable plaintiff to possess himself of defendant's property and assets, or any of them, or to convert the same, or any of them, to his own use, or was or is wrongful or illegal, or a breach of the plaintiff's duty to this defendant in the premises, but on the contrary this plaintiff alleges that at all of said times the

said defendant, The Moore Filter Company, was indebted to the plaintiff in a much larger sum than the sum of $12,500, and the said The Moore Filter Company *is no* indebted to the plaintiff in the sum of $18,358, over and above all counterclaims and offsets of all kinds and natures, as and in the manner set forth in plaintiff's complaint herein. [20]

Answering the seventeenth paragraph or subdivision of defendant's answer and counterclaim, plaintiff denies that he ever did any of the wrongful acts alleged and charged therein, and denies that he ever at any time heretofore owed, or that he now owes, to the defendant $7,500, or any sum whatsoever, but on the contrary alleges that said defendant is indebted to the plaintiff in the sum of $18,358, as in plaintiff's complaint herein set forth.

WHEREFORE, plaintiff prays judgment for the sum of $18,358 together with interest thereon, as prayed for in his complaint herein, and that the defendant take nothing by its counterclaim, and that plaintiff recover his costs and disbursements herein.

J. L. TAUGHER,
Plaintiff.

United States of America,
Northern District of California,—ss.

John L. Taugher, being first duly sworn, deposes and says; that he is the plaintiff in the foregoing entitled action; that he has read the foregoing answer to defendant's counterclaim, and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on informa-

tion and belief, and as to those matters he believes it to be true.

J. L. TAUGHER.

Subscribed and sworn to before me this 25th day of October, 1915.

[Seal] FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. **[21]**

Exhibit "B."

Minutes of a special meeting of the board of directors of The Moore Filter Company, duly called and held at No. 60 Wall Street in the City of New York, on the 27th day of August, 1913, at three o'clock in the afternoon.

The following directors were present in person:

Henry B. Haigh,
Watson B. Robinson,
Robert Burns,
J. L. Taugher,

being all of the directors of the Company.

The vice-president occupied the chair and the secretary acted as secretary of the meeting.

The vice-president presented to the meeting a communication, which was ordered to be filed, dated Colorado Springs, Colorado, August 5th, 1913, from Mr. George Moore, then president of this company, covering a settlement to be made with the Golden Cycle Mining Company. Thereupon Mr. J. L. Taugher reported that he had closed a settlement with said Golden Cycle Mining Company under which he had secured for the company a check of

said Mining Company for the sum of Fifty Thousand Dollars ($50,000), together with certain other rights accruing to this company.

Thereupon, on motion of Mr. Robinson, duly seconded, the board unanimously authorized the officers to pay to said J. L. Taugher out of said moneys the sum of Ten Thousand Dollars ($10,000), and the secretary was instructed to communicate with Mr. George Moore and report to this board as to whether or not under such arrangements compensation in addition to said Ten Thousand Dollars ($10,000) should be paid to said J. L. Taugher, and that Mr. Taugher's further fee for his services in connection therewith, if any be fixed thereafter by the board.

There being no further business to come before the meeting, the same was adjourned.

(Signed) ROBERT BURNS,
Secretary. [22]

Due service and receipt of a copy of the within Answer to Counterclaim, is hereby admitted this 25th day of October, 1915.

SCOTT HENDRICKS,
Attorney for Defendant.

[Endorsed]: Filed Oct. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

THE MOORE FILTER COMPANY (a Corporation),

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Thousand Three Hundred Fifty-eight Dollars.

JOHN P. CLEESE,
Foreman.

[Endorsed]: Filed January 20, 1916. Walter B. Maling, Clerk. [24]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause having come on regularly for trial upon the 13th day of January, 1916, being a day in the November, 1915, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Jacob M. Blake, Esq., appearing as attorney for plaintiff and Scott Hendricks and A. A. Rosenshine, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with on the 14th, 18th, 19th and 20th days of January, all in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury, and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Eighteen Thousand Three Hundred Fifty-eight Dollars. John P. Cleese, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that John L. Taugher, plaintiff, do have and recover of and from Moore Filter Company, a corporation, defendant, the sum of Eighteen Thousand Three Hundred Fifty-eight and 00/100 ($18,358)

Dollars, together with his costs in this behalf expended taxed at $85.60.

Judgment entered January 20, 1916.

WALTER B. MALING,
Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,
Clerk. [25]

[Endorsed]: Filed Jan. 20, 1916. Walter B. Maling, Clerk. [26]

In the District Court of the United States for the Northern District of California.

No. 15,832.

JOHN L. TAUGHER

vs.

MOORE FILTER COMPANY, a Corporation.

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern Division of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 20th day of January, 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed January 20th, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

In the District Court of the United States, Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,

Defendant.

JOHN L. TAUGHER, *pro se.*

SCOTT HENDRICKS, for Defendant.

Memorandum Opinion.

VAN FLEET, District Judge:

Under the terms of the contract between the witness Edwin Letts Oliver and the defendant, the former was unquestionably constituted the agent of the defendant in this State; and the evidence of the witness satisfies me that such relationship still subsisted at the date of the service of the process herein. The fact as developed that differences had arisen between the defendant and its agent as to their respective rights under the contract, and that in some respects the terms of the contract were ignored in their dealings with each other, while possibly giving rise to a right of action for its breach, did not operate to abrogate the contract nor terminate the agency; and the evidence shows that the relations of

the parties to that contract were not terminated until subsequent to the service of the process in question.

It was not essential to render the service of process binding on the defendant that the agent should have been the "managing agent" or the "secretary" of the defendant. All [28] the statute requires is that the corporation maintain an agent in this State, and as said in Denver & Rio Grande R. R. Co. vs. Roller, 100 Fed. 738, 741: "It is obvious that this does not mean that it must be the general managing agent of the corporation. The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the State where the service is made." That Oliver was authorized under the terms of the contract to manage the business of the defendant so far as it was committed to him in this State is, I think, well within the terms of the contract; and that his position was such as to render service upon him effectual, I think fairly appears.

The motion to quash the service of process will be denied.

[Endorsed]: Filed Sept. 27, 1915. Walter B. Maling, Clerk. [29]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

J. L. TAUGHER,

Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,

Defendant.

Defendant's Bill of Exceptions.

BE IT REMEMBERED that on Thursday, January 13, 1916, the above-entitled action came on regularly for trial before the above-entitled court and a jury, the Honorable Wm. C. Van Fleet presiding, the plaintiff being represented by J. M. Blake, Esq., attorney for said plaintiff, and the defendant being represented by Scott Hendricks, Esq., and Albert A. Rosenshine, Esq., attorneys for said defendant.

Thereupon the following proceedings were had:

J. M. Blake, Esq., made the opening statement for the plaintiff, in which it appeared that all the contracts sued upon were entered into outside of the State of California, and that all the services performed by plaintiff were performed outside of the State of California, and that defendant was a foreign corporation organized under the laws of the State of Maine.

That at the conclusion of the opening statement of plaintiff, in view of the objection reserved in de-

fendant's answer, the Court suggested the question as to whether or not it had jurisdiction of the defendant, or of the subject matter of this action, it growing out of a transaction which did not have its origin in this State or in this district, and no part of which was performed in this State or in this district, and the service in this action being in its nature a substituted one; but after argument of counsel and further consideration it was concluded [30] that in view of the nature if the pleadings and the fact that defendant had interposed a counterclaim asking affirmative relief, the Court had acquired jurisdiction, and so ruled; to which ruling the defendant then reserved an exception, being Defendant's Exception No. ——.

Testimony of John L. Taugher, for Plaintiff.

JOHN L. TAUGHER, the plaintiff, called as a witness on his own behalf, testified that he was a resident of California, lived in San Francisco, and was a lawyer by profession.

That he had undertaken the services alleged at the instance of the president of the Moore Filter Company.

That Moore had asked him to go to London on behalf of the company to ascertain in a general way the attitude of infringing Australian and South African Mining Companies from their representatives in London.

That certain mining companies in South Africa and Australia had constructed machines for the use of this process, and the Moore Filter Company

(Testimony of John L. Taugher.)

claimed this was infringement. That most of these companies were represented in London and financed there; that it was Mr. Moore's desire that plaintiff negotiate with the London representatives looking to a settlement; that the forming of certain companies, especially one in South Africa was discussed, to which company all infringement claims were to be assigned.

That he (Taugher) left London about the 16th or 17th of May, 1913.

That the four directors of the company at that time were, Moore, President, Haigh, vice-president, Robinson and Burns. That he (Taugher) did not know whether the last two knew of his employment by Moore, but that Haigh did. [31]

Thereupon the following questions were asked, and the following proceedings occurred:

Mr. BLAKE.—Q. I will ask you to identify three letters which I hand to you, and ask you if you recognize them?

A. Yes. Those three letters—there are four here—were handed to me by Mr. Haigh, who signs himself as vice-president and treasurer of the Moore Filter Company.

Mr. BLAKE.—These are letters of introduction by Mr. Haigh as vice-president, authenticating the purpose and object of the plaintiff in making this trip. We offer them in evidence for that purpose.

Mr. ROSENSHINE.—We object to the use of those letters, first, on the ground that they were never delivered; and second, on the ground that they

(Testimony of John L. Taugher.)

do not authenticate the purpose of this trip.

The COURT.—You offer them for the purpose of corroborating the witness' statement that Haigh knew of his going?

Mr. BLAKE.—Yes, and in support of the authority of the company. They were delivered to the plaintiff.

The COURT.—These are all letters of introduction. I will allow them to go in on the question of the knowledge of one of the directors.

Mr. ROSENSHINE.—Exception.

Which exception the defendant hereby designated as its Exception No. ——.

Plaintiff's Exhibit #1—Letter.

THE MOORE FILTER COMPANY.
United States Realty Building.
115 Broadway.
New York, U. S. A., May 16, 1913. [32]

Moreing, Esquire,
Bewick, Moreing & Company,
62 London Wall,
London, E. C.

My dear Sir:

Permit me to introduce the bearer, Mr. J. L. Taugher, counsel of The Moore Filter Company, who is visiting London in connection with the Company's interests.

Any courtesies shown Mr. Taugher will be much appreciated by

Yours very truly,
(Signed) HENRY B. HAIGH,
Vice-pres. and Treasurer.

HBH/H.

THE MOORE FILTER COMPANY,
United States Realty Building.
115 Broadway,
New York, U. S. A., May 16, 1913.

Milner, Esquire,
Wernher Belt & Company,
1 London Wall Buildings,
London, E. C.

My dear Sir:

Permit me to introduce the bearer, Mr. J. L. Taugher, counsel of The Moore Filter Company, who is visiting London in connection with the Company's interests.

Any courtesies shown Mr. Taugher will be much appreciated by

Yours very truly,
HENRY B. HAIGH,
Vice-pres. and Treas. [33]

HBH/H.

LETTER.

THE MOORE FILTER COMPANY,
United States Realty Building.
115 Broadway,
New York, U. S. A., May 16, 1913.

My dear Mr. Cooper:

The bearer, J. L. Taugher, Esquire, counsel of our Company, having matters in connection with the interests of our Company requiring his presence in London, I have told him something of the great pleasure that I have in meeting and suggested that he call and see you.

Bespeaking for Mr. Taugher similar courtesies to

those which you were so good as to show me, I beg to remain with sincere regard,

Yours truly,

(Signed) HENRY B. HAIGH,

HBH/H. Vice-pres. and Treasurer.

DURRANT, COOPER, Esquire,
% Durrant, Cooper & Freemen,
Bank Chambers,
70–71 Gracechurch St.,
London, E. C. [34]

LETTER.

THE MOORE FILTER COMPANY,
United States Realty Building.
115 Broadway,
New York, U. S. A., May 16, 1913.

My dear Mr. Mitchisen:

The bearer, J. L. Taugher, Esquire, counsel of our Company, having matters in connection with the interests of our Company requiring his presence in London, I have told him something of the great pleasure that I had in meeting and suggested that he call and see you.

Bespeaking for Mr. Taugher similar courtesies to those which you were so good as to show me, I beg to remain with sincere regard,

Very truly,

(Signed) HENRY B. HAIGH,

HBH/H. Vice-pres. and Treas.

(Testimony of John L. Taugher.)

A. M. MITCHISEN, Esquire, Chairman,
The Waihi Gold Mining Company, Limited,
11 Avchurch Lane,
London, E. C.

Mr. BLAKE.—Q. State whether or not, at the time of your sailing for London, any members of the Moore Filter Company accompanied you to the boat.

Mr. ROSENSHINE.—I object to the question upon the ground that it is immaterial, irrelevant and incompetent.

The COURT.—A corporation, like an individual, may be bound equally in either one of two ways; by previous authorization, [35] or by ratification; ratification is a fact which may be deduced from circumstances.

Mr. ROSENSHINE.—Would the fact that certain gentlemen accompanied him to a boat tend to be a ratification?

The COURT.—That mere fact may not, but the circumstance is for the jury to put their construction upon. Your objection goes to the weight of it, and not to its admissibility.

Mr. ROSENSHINE.—Exception.

Which exception the defendant hereby designates as its Exception No. ——.

To which question the witness replied:

A. Yes, Mr. Moore, the president, and Mr. Haigh, the vice-president, came down to the boat on the morning I was sailing, and we discussed there various things that I would take up in London in relation to the business on which I was going.

(Testimony of John L. Taugher.)

That thereafter and on August 16th, 1913, John L. Taugher was elected a director of The Moore Filter Company, and was elected president of the company on August 19th, 1913, and continued to serve until the 9th day of December, 1913, when he resigned as president and director, and his resignation was accepted.

Mr. BLAKE.—Q. State what services you were actually called upon to perform for the company during the period of your incumbency.

Mr. ROSENSHINE.—We object to the question in the form as put. Counsel does not qualify the kind of services, whether as president or as director, and that should be introduced into that question.

The COURT.—I think the question is proper, the objection is overruled.

Mr. ROSENSHINE.—Exception.

Which exception the defendant hereby designated as its Exception No. ——. [36]

To which question witness answered:

A. After I came back to New York with the $50,000 check, I think it was the day after I got back, we held a meeting, the day I got back, I think, when my fee was formally—the fee fixed in the contract was formally put through by the board, and the officers—of which I was president—were directed to make a check to me for $10,000. The next morning I deposited the check for $50,000 to the credit of the Moore Filter Company, and made a check to myself for the $10,000, that is, I did, and the secretary and vice-president signed the check also—Mr. Haigh.

(Testimony of John L. Taugher.)

Within—just a very short time, I think it was only within a few hours, the bank account of the Moore Filter Company was attached, and an attachment was put upon the office of the company, that is, a keeper was put in, and I think the safes were sealed, the stuff was not moved out by the sheriff, and this thing was all practically tied up. The action was started by certain of the stockholders of the Moore Filter Company who had loaned to the company some $20,000 five or six years prior to this time, and they never had gotten their money. When I brought back the check for $50,000, I just had it in the bank, practically, when this attachment was put on for the $20,000—$20,000 odd, I think it was $28,000. The following day I believe there were some other actions started against the company on which other attachments were made.

That in answer to other questions to which no objection was made or exception taken he testified that he took up the matter of a claim of the Moore Filter Company against the Golden Cycle Mining Company. That an action for infringement had been begun in the United States District Court of West Virginia some years [37] before, and that the same had never been pressed. That acting for the Moore Filter Company he carried on negotiations both in person and by letter and telegram with the officials of the Golden Cycle Mining Company, and as a result of these negotiations he obtained a settlement whereby the Golden Cycle Mining Company paid to the Moore Filter Company $50,000. That in effect-

(Testimony of John L. Taugher.)

ing this settlement the following instruments were signed by the parties thereto on July 31st, 1913; agreed statement of facts in said action authorizing the Court to enter judgment for $50,000 in favor of the Moore Filter Company and against the Golden Cycle Mining Company; an agreement signed by the Moore Filter Company acknowledging the payment of $50,000 and agreeing to hold the Golden Cycle Mining Company harmless from all claims and demands on account of the use by it of the Moore patents; a license by the Moore Filter Company to the Golden Cycle Mining Company authorizing it to use the Moore process in the future, in consideration of the payment of said sum of $50,000.

That upon and in accordance with the confession of judgment in said action a decree was thereafter duly signed and ordered entered by the Court on the 25th day of August, 1913, in the words and figures following:

Plaintiff's Exhibit # 8.

United States of America,
Southern District of West Virginia.

No. 337—IN EQUITY.

In the District Court of the United States for the Southern District of West Virginia.

THE MOORE FILTER COMPANY,
Complainant,

vs.

THE GOLDEN CYCLE MINING COMPANY,
Defendant.

Decree.

The foregoing cause coming on to be heard on this 25th day [38] of August, A. D. 1913, upon the agreed Statement of Facts submitted by both of the parties hereto; the said complainant, the Moore Filter Company, appearing by R. M. Price, one of the solicitors for the complainant, and the defendant, The Golden Cycle Mining Company, appearing by T. S. Clark, one of the solicitors for said defendant; and the Court having read the stipulation of facts and heard the statement of solicitors and counsel representing the respective parties, and being now fully advised in the premises, doth hereby find the facts in said cause to be as follows, to wit:

1st. That The Moore Filter Company, the complainant herein is now, and at all times alleged in the bill of complaint herein was, the exclusive owner of letters patent from the United States upon a process for filtering slimes for the extraction of precious metals therefrom, as in said bill of complaint set forth and stated.

2d. That the defendant, The Golden Cycle Mining Company, in the year 1907, constructed a mill or reduction plant at Colorado Springs, El Paso County, Colorado, for the purpose of treating gold ores by the cyanide process, and extracting metal therefrom, and producing the same in merchantable form for sale to the mints of the United States. That in said mill there was constructed and installed for use, what is commonly known as vacuum filters, the same being

apparatus designed to extract gold values from ore slimes by the use of the process described in the letters patent hereinbefore mentioned; the same being Letters Patent No. 764,486 of the United States; that upon the construction and installation of said filters, in said year, and all the time thereafter to the present date, the defendant has used and operated said filters by the application of said process covered by said letters patent, as aforesaid, now owned by the plaintiff herein, and at [39] all times, as in said bill of complaint set forth.

3d. That from time to time, from and after the installation and during the operation and use of said filters by the use of said process, The Moore Filter Company and its grantors have demanded of the defendant that it pay a royalty for the use of said process in the operation of said filters; that said demands were based upon the claim of The Moore Filter Company, and its grantors, that the use by the defendant herein of said process in the operation of said filters was an infringement of the rights of the complainant, and that the defendant has no right to use said process, as aforesaid, without making payment to The Moore Filter Company therefor. That the defendant at all times recognized said demands, but refused to in any manner compensate The Moore Filter Company and its grantors for the use of the same, and at no time heretofore has the defendant paid, or in any way compensated, The Moore Filter Company, or its grantors, for the use of said process in the operation of said filters.

4th. That the defendant admits that what are known and designated as claims four (4) and five (5) of said letters patent are valid, and that by the defendant's use of said process in the operation of said filters, as aforesaid, it has infringed the rights granted to the patentee under said letters patent; that thereby the complainant, The Moore Filter Company, has been damaged in the sum of more than Fifty Thousand Dollars ($50,000), and that the defendant, The Golden Cycle Mining Company, by the use of said process, as aforesaid, has been benefited in the amount of more than said sum.

5th. That by reason of the unauthorized use by the defendant, The Golden Cycle Mining Company, of said process as above set forth, The Moore Filter Company, the complainant herein, has been damaged in a sum in excess of Fifty Thousand [40] Dollars ($50,000), and the said Golden Cycle Mining Company, by the unauthorized use of said process has been benefited in an amount in excess of Fifty Thousand Dollars ($50,000), but complainant, The Moore Filter Company, by way of compromise has agreed, and hereby does formally agree, to accept from the defendant The Golden Cycle Mining Company, Fifty Thousand Dollars ($50,000) in full settlement and payment of such damage and such past unauthorized use by The Golden Cycle Mining Company of said process.

6th. That on the 29th day of December, 1903, Letters Patent of the United States entitled "Improvement in Filtering System," and numbered 748,088, were issued in the name of the United States and are

held and owned by the complainant company, but that no issue is tendered by the complainant company based on said letters patent No. 748,088, and all claims in the foregoing cause, based upon or arising out of the said letters patent No. 748,088 are abandoned.

7th. That an agreement having been made between the parties hereto, under which a stipulation has been entered into, and under which licenses covering past and future use of the devices covered by letters patent No. 748,088 and the processes covered by letters patent No. 764,486 have been granted, there no longer exists any necessity for an injunction or the application for an injunction, and the complainant withdraws its request in that behalf.

WHEREFORE, THE COURT DOTH ORDER, ADJUDGE and DECREE, that the complainant do have and recover of the defendant the sum of Fifty Thousand Dollars ($50,000), together with its costs in this suit, to be taxed, and judgment is hereby entered therefor.

Done in open court this 25th day of August, A. D. 1913.

(Signed) BERY F. KELLER,
Judge. **[41]**

Testimony of E. L. Oliver, for Plaintiff.

E. L. OLIVER, called as a witness for plaintiff, testified substantially, as follows:

That he is a mining engineer engaged in business in San Francisco in manufacturing and selling filters for a cyanide process and used for the same purpose

(Testimony of E. L. Oliver.)

as the Moore Filter, and using a process similar to the Moore process; that he has been in this business for the last seven years. That he had a general idea in the year 1913 of the patent situation in the United States relating to filters in use in mining operations similar to the Moore process, and was also familiar with the claims made by the Moore Filter Company under its patent filtering process. That the Moore Filter Company claimed that his patents infringed its patents. That he was familiar with the litigation between the Moore Filter Company and the Tonopah Belmont Mining Company; that he had studied the matter very thoroughly because he was having trouble with the Moore Filter Company. That prior to February, 1913, claims were being made by the Moore Filter Company that he was infringing their patents. That he had obtained patents relative to filter apparatus and had given a great deal of consideration to the filter situation prior to March, 1913; both in the United States and abroad. That he made a settlement with the Moore Filter Company in February or March, 1913, whereby he became entitled to 10% of all money that might be received by the Moore Filter Company for infringement of its patents and thereafter had a large interest in the income of the company. That he knew of the settlement with the Golden Cycle Mining Company for $50,000. That everybody who was interested knew of this and that it was announced in the technical journals. [42]

The following question was then asked the witness and the following took place:

By Mr. BLAKE.—Would you consider that the procuring and entry of that judgment against the Golden Cycle Mining Company in the United States Circuit Court for the Northern District of West Virginia, that being a district other than the third circuit, would be of value to the Moore Filter Company in making settlements with various other infringers of the process of the Moore Filter Company in various parts of America and elsewhere.

Mr. ROSENSHINE.—We object to the question on the ground that Mr. Oliver is not competent to pass on the value of a judgment of confession, and also on the further ground that it is incompetent.

The COURT.—I think so.

Mr. BLAKE.—Is there any objection to the form of the question?

Mr. ROSENSHINE.—No, I don't think so. The objection is generally to the fact that Mr. Oliver, as a mining man, cannot testify to the value of a judgment of confession.

The COURT.—The question includes more than that. If that is your objection alone, I think it would not be good. What counsel really is asking you, Mr. Oliver, is this, in substance; whether from your knowledge of the business you would consider that a second adjudication of the validity of the patent, where the patent had given rise to litigation growing out of the infringements, would be of value to one owning the patent in making future settlements with parties who had infringed the patent?

(Testimony of E. L. Oliver.)

A. Yes, I believe it would be of very vital importance, for this reason, that everyone who has had experience in patent matters knows that an adjudication in one circuit means nothing more than the right to go and fight it out in some other circuit, because it is never final, whereas if you get it in two circuits, [43] the chances are very much better for a complete settlement of the case.

Mr. BLAKE.—Q. What value in your judgment was the confession of judgment to the Moore Filter Company.

Mr. ROSENSHINE.—The same objection.

Mr. BLAKE.—Q. If the Moore Filter Company had made reasonable use of it in its negotiations and dealings with other mining companies that were infringers of its patents?

Mr. ROSENSHINE.—Objected to on the same ground, and on the further ground that it is assuming a fact not in the evidence—if the Moore Filter Company made use of it.

The COURT.—What is in counsel's mind is this: The value of the procuring of this decree was more or less potential—you might say in a sense intangible—but would depend upon the use which was made of the fact that such a decree had been procured; the question really put to the witness involves this inquiry, what in his judgment, having a knowledge of the business of the Moore Filter Company—in fact, having an interest in the business growing out of his contractual relations with that company,—what would have been the value to the Moore Filter

(Testimony of E. L. Oliver.)

Company of this decree if further availed of by them for the purposes for which it was available. I think that to that extent the witness is competent to answer.

Mr. ROSENSHINE.—Exception.

Which exception the defendant hereby designates as its Exception No. ——.

To said question the witness answered:

It is a difficult matter to put in dollars and cents. It came at a psychological moment. The Moore Filter Company had [44] won its suit against the Tonopah Belmont in another circuit; and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah Belmont case was still in the court, waiting a judgment—waiting for the accounting. They had won the case.

The COURT.—They had gotten the decree?

A. They had gotten the decree and were waiting for the accounting. This other was going on just at that time, and getting an actual cash settlement meant a good deal to the outside world. They could see that if they did infringe, the chances were pretty slim of their winning out.

Q. I suppose if they had infringed, they would have been readier to settle than previously.

A. Yes, very much more.

The witness then testified in answer to other questions, to which no objection was taken nor exception reserved, that he knew of large claims being made by the Moore Filter Company against South African and Australian infringers. That taking

(Testimony of E. L. Oliver.)

into consideration his knowledge of the facts the confession of judgment was worth in thousands $30,000, $40,000, or even $50,000, that it was hard to fix an exact figure. That the effect was seen in future settlements that they made, in one case they got $90,000.

Cross-examination.

That he does not know definitely that this $90,000 settlement was made easy because of the Golden Cycle settlement, but that he believed it was one of the things that led up to it. In the judgment of witness, it would not have been as valuable for the Moore Filter Company to have simply gotten a settlement with the Golden Cycle Mining Company, and an acknowledgment of its infringement of the Moore patents as to have a public entry of record in the form of a decree, and that he reached this conclusion because this settlement was made in the form of a judicial **[45]** decree in a circuit other than that in which the Moore Filter Company had secured its judgment in the action against the Tonopah Belmont.

Plaintiff's evidence showed that all contracts sued upon were entered into outside of the State of California, that all services performed by him for the company were performed outside of the State of California, and that defendant was a foreign corporation organized under the laws of the State of Maine, and having its business office in the City of New York.

At the conclusion of plaintiff's case, defendant moved to dismiss the action on the ground that the Court had acquired no jurisdiction and can lawfully exercise no jurisdiction over defendant or the subject matter of this action.

Which motion was denied by the Court, and to which ruling defendant then and there duly excepted, which exception defendant designated as its Exception No. ——.

Defendant then introduced its evidence, including the deposition of William H. Harding, Jr., in which he testified that he is an attorney at law, and president of the Moore Filter Company. That the company has never received any patent rights under the agreement with the Golden Cycle Mining Company, and that to the best of his knowledge it did not receive anything of value other than the $50,000 paid to it, nor has it ever used the judgment obtained in that matter, and the same has not been of any value to the company.

The Court then charged the jury, which having retired and deliberated, thereafter returned a verdict in favor of plaintiff and against the defendant in the sum of $18,358, and upon said verdict judgment was entered against said defendant, and in favor of the plaintiff in said sum, and for costs in the sum of $———. **[46]**

AND, NOW, IN FURTHERANCE OF JUSTICE, defendant presents the foregoing as its Bill of Exceptions in this case and prays that the same may be

settled and allowed and signed and certified to as provided by law.

SCOTT HENDRICKS,
A. D. D.
ALBERT A. ROSENSHINE,
Attorneys for Defendant.

Order Settling and Allowing Bill of Exceptions.

The foregoing Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled.

Dated July 3d, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jul. 3, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[47]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

J. L. TAUGHER,
Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable, the District Court of the United States, in and for the Northern District of California, Second Division.

Moore Filter Company, a corporation, defendant in the above-entitled action, feeling themselves ag-

grieved by the verdict of the jury and the judgment thereupon entered in favor of the plaintiff in said cause on the 20th day of January, 1916, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of Eighteen Thousand, Three Hundred and Fifty-Eight Dollars ($18,358), come now by Scott Hendricks, Esq., its attorney, and petition said Court for an order allowing it to prosecute a Writ of Error to the Honorable, the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and in this behalf alleges that in said judgment and in the proceedings had prior thereto in said action certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors [48] so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order may be made by this Court fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United

States Circuit Court of Appeals in and for the Ninth Circuit.

Dated April 12, 1916.

MOORE FILTER COMPANY,
a Corporation.
By SCOTT HENDRICKS,
Its Attorney.

[Endorsed]: Filed April 13, 1916. Walter B. Maling, Clerk. **[49]**

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

J. L. TAUGHER,
Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Now comes the Moore Filter Company, a corporation, defendant in the above-entitled action, by Scott Hendricks, Esq., its attorney, and specifies the following as the errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause:

I.

That the District Court of the United States for the Northern District of California, Second Division, erred in refusing to grant defendant's Motion to Quash Service of Summons alleged to have been

made upon the defendant corporation by serving Edwin Letts Oliver, its alleged agent.

BEING EXCEPTION NO. 1.

II.

That the said Court erred in refusing to sustain defendant's plea to the jurisdiction of the Court, and in refusing to dismiss this action for want of jurisdiction, after plaintiff had made his opening statement, and before any evidence was introduced.

BEING EXCEPTION NO. 2.

III.

That said Court erred in admitting in evidence plaintiff's **[50]** exhibit 1, purporting to be letters of introduction, over objections of defendant, to which ruling defendant duly excepted.

BEING EXCEPTION NO. 3.

IV.

That the said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for the plaintiff of the witness John L. Taugher;

"Mr. BLAKE.—Q. State whether or not, at the time of your sailing for London, any members of the Moore Filter Company accompanied you to the boat?"

To which the witness answered: "Yes, Mr. Moore, the president, and Mr. Haigh, the vice-president, came down to the boat on the morning I was sailing, and we discussed there various things that I would take up in London in relation to the business on which I was going."

BEING EXCEPTION NO. 4.

V.

That the said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for the plaintiff of the witness John L. Taugher:

"Mr. BLAKE.—Q. State what services you were actually called upon to perform for the company during the period of your encumbency?"

To which the witness answered: "A. After I came back to New York with the $50,000 check, I think it was the day after I got back, we held a meeting the day I got back, I think, when my fee was formally—the fee fixed in the contract was formally put through by the board, and the officers—of which I was president—were directed to make a check to me for $10,000. The next morning I deposited [51] the check for $50,000 to the credit of the Moore Filter Company and made a check to myself for the $10,000, that is, I did, and the secretary and the vice-president signed the check also—Mr. Haigh. Within—just a very short time, I think it was only within a few hours, the bank account of the Moore Filter Company was attached, and an attachment was put upon the office of the company, that is, a keeper was put in, and I think the safes were sealed, the stuff was not moved out by the sheriff, but this thing was all practically tied up. The action was started by certain of the stockholders of the Moore Filter Company who had loaned to the company some $20,000 five or six years prior to this time, and they never had gotten their money. When I

brought back the check for $50,000, I just had it in the bank, practically, when this attachment was put on for the $20,000—$20,000 odd, I think it was $28,000. The following day I believe there were some other actions started against the company, on which other attachments were made."

BEING EXCEPTION NO. 5.

VI.

That the said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for plaintiff of the witness E. L. Oliver: "Q. Had you given consideration to the situation prior to March, 1913, from the point of view of an owner of patented rights and also from the point of view of one threatened with litigation for infringing the rights of the Moore Filter Company?"

To which the witness answered: "A. Yes, a great deal of consideration for a number of years in fact prior to that time."

BEING EXCEPTION NO. 6. [52]

VII.

That said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for plaintiff of the witness E. L. Oliver:

"Mr. BLAKE.—Q. What value, in your judgment, was that confession of judgment to the Moore Filter Company?— Q. If the Moore Filter Company had made reasonable future use of it in its negotiations and dealings with other mining companies that were infringers of its patents."

To which witness answered: "A. It is a difficult matter to put in dollars and cents. It came at a psychological moment. The Moore Filter Company had won its suit against the Tonopah-Belmont in another circuit, and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah-Belmont case was still in the courts, awaiting a judgment,—waiting for the accounting. They had won the case."

BEING EXCEPTION NO. 7.

VIII.

That the said Court erred in permitting witness E. L. Oliver to testify as an expert as to the value of the confession of judgment.

BEING EXCEPTION NO. 8.

IX.

That the said Court erred in refusing to grant defendant's motion to dismiss the above-entitled action after the testimony of plaintiff had been taken, on the ground that the Court had no jurisdiction, and could lawfully exercise no jurisdiction over the defendant or over the subject matter in this action.

BEING EXCEPTION NO. 9. [53]

X.

That the said Court erred in admitting in evidence Plaintiff's Exhibit "A" purporting to be an affidavit of Henry B. Faber, filed in the action in the Supreme Court of the State of New York, County of Kings, wherein Henry E. Seal, suing in behalf of himself and of the stockholders and creditors of the Moore Filter Company, was plaintiff against George Moore,

Lulu Moore, Henry B. Haigh, John L. Taugher, Watson B. Robinson, Robert Burns and Moore Filter Company as defendants.

BEING EXCEPTION NO. 10.

XI.

That said Court erred in admitting to evidence the Plaintiff's Exhibit "B," purporting to be the affidavit of Harry E. Seal filed in the action in the Supreme Court of the State of New York, County of Kings, wherein Henry E. Seal, suing in behalf of himself and of the stockholders and creditors of the Moore Filter Company, was plaintiff against George Moore, Lulu Moore, Henry B. Haigh, John L. Taugher, Watson B. Robinson, Robert Burns, and Moore Filter Company, as defendants.

BEING EXCEPTION NO. 11.

XII.

That the said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for plaintiff of witness Henry B. Faber:

"Q. In exhibit 'B,' did not Seal accuse George Moore of making an agreement with J. N. Shenstone which was thoroughly corrupt and stating that it constituted the grossest sort of breach of trust on the part of Moore and that the same rendered Moore liable to forfeiture of any office in the Moore Filter Company under the provisions of subdivision 4 of section 90 of the General Corporation Law?" **[54]**

To which witness answered: "A. He did; those are the very words."

BEING EXCEPTION NO. 12.

XIII.

That the said Court erred in overruling the objection of counsel for said defendant to the following question asked by counsel for plaintiff of witness Henry B. Faber:

"Q. Did not Mr. Seal in his affidavit depose and say that Haigh had been charged by Moore under oath with gross and fraudulent misapplication of the funds of the Moore Filter Company and that Haigh had bargained with Moore for immunity from prosecution therefor."

To which witness answered: "A. Outside of the record I don't remember."

BEING EXCEPTION NO. 13.

XIV.

That the said Court erred in sustaining the objection of counsel for said plaintiff to the following question asked of witness Bertram L. Fletcher:

"Q. Assuming that the evidence in this case show that on the 16th day of August, 1913, an attorney was elected a director of a Maine corporation; that on the 19th day of August, 1913, said attorney was elected the president of said corporation and continued to hold the two offices of director and of president until December 9, 1913, upon which date he resigned both offices; that at the time of his election as a director and at the time of his election as president there was no provision of the by-laws fixing any compensation for such president nor for services as director, nor was there taken at either of those meetings or at any other time any action by either the

directors or the stockholders fixing any compensation for said attorney either as president or director, and no agreement of hiring was made [55] between said attorney and said corporation. State whether or not, assuming the facts as I have stated them to be true, in your opinion the attorney has any legal or enforcible claim against the corporation under the laws, statutes and decisions of the state of Maine for services rendered as president of such corporation?"

To which the witness answered: "A. During that period?"

"Q. From August 19th, the date of his election, to December 7th, the date of the acceptance of his resignation." "A. No, he would not have any."

BEING EXCEPTION NO. 14.

XV.

And defendant now specifies the particulars in which the evidence was insufficient to justify the decision of the jury, as follows:

I.

The evidence is insufficient to justify the jury in awarding the sum of $7,000 to plaintiff as reasonable value of his services in connection with his trip to London.

II.

The evidence is insufficient to justify the jury in awarding the sum of $4,000 to plaintiff for salary as president of the Moore Filter Company.

III.

There is not sufficient evidence from which the jury could conclude that there was any agreement

made by the Moore Filter Company with plaintiff as to his salary as president, or to show a ratification of any agreement made with plaintiff by George Moore in this behalf, or to show that there was any implied promise on the part of the company to pay any salary to plaintiff for his services as president. [56]

IV.

The evidence is insufficient to justify the jury in awarding $8,000 for alleged extra services in the Golden Cycle matter, in addition to the $10,000 admittedly paid to plaintiff for his services in connection with the Golden Cycle matter, as there was no evidence of any extra services.

WHEREFORE, the said defendant prays that the judgment in favor of the plaintiff herein and against the defendant be reversed and that the said District Court of the United States in and for the Northern District of California, Second Division, be directed to grant a new trial of said cause.

SCOTT HENDRICKS,
ALBERT A. ROSENSHINE,
Attorneys for Plaintiff in Error (Defendant in Court below).

[Endorsed]: Filed Apr. 13, 1916. Walter B. Maling, Clerk. [57]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

J. L. TAUGHER,

Plaintiff,

vs.

MOORE FILTER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

Upon motion of Scott Hendricks, Esq., Attorney for the defendant in the above-entitled action, and upon the filing of a petition for writ of error and an Assignment of Errors herein,

IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond be given by the defendant upon said writ of error be and the same is hereby fixed at the sum of Forty Thousand Dollars ($40,000), and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded pending the determination of such writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated April 12, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Apr. 13, 1916. Walter B. Maling, Clerk. [58]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

THE MOORE FILTER COMPANY, a Corporation,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS that we, The Moore Filter Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto John L. Taugher for the full and just sum of Forty Thousand ($40,000) Dollars to be paid to the said John L. Taugher, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Signed and dated this 6th day of July, A. D. 1916.

WHEREAS, lately at a regular term of the District Court of the United States for the Northern District of California at the city of San Francisco, in said district, in an action pending in said court between said John L. Taugher, as plaintiff, and The Moore Filter Company, as defendant, Cause No. 15,832, on the law docket of said court, judgment was rendered against the said The Moore Filter

Company on the 20th day of January, 1916, for the sum of Eighteen Thousand Four Hundred and Forty-three and 60/100 ($18,443.60) Dollars with interest thereon at the rate of seven (7) per cent and the said The Moore Filter Company has obtained a writ of error to reverse the said judgment of the said court in the aforesaid action and a citation directed to the said [59] John L. Taugher, citing him to appear and to be before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California according to law within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such that if the said The Moore Filter Company, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE MOORE FILTER COMPANY.

(Seal)

By WM. H. HARDING, Jr.,
President.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY.

By B. F. CATA,
By W. S. ALEXANDER.
Attorneys in Fact.

This bond is approved this 17th day of July, 1916.

WM. C. VAN FLEET,
Judge.

State of New York,
County of New York,—ss.

On the 29th day of June, 1916, before me personally came William H. Harding, Jr., to me known, who being by me duly sworn did depose and say, that he resides in the City of New York; that he is the president of the Moore Filter Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation and [60] that he signed his name thereto by like order.

[Seal] H. E. EMMETT,
Notary Public for Kings County, No. 9.

Certificate filed in New York County, No. 20.

Nassau Bronx, No. 1, Queens, No. 631, Richmond and Westchester Counties.

Kings County, Register's Office, No. 8008.

New York County, Register's Office, No. 8023.

Bronx County, Register's Office, No. 804.

My commission expires March 30, 1918.

[Endorsed]: Filed Jul. 17, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [61]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,832.

JOHN L. TAUGHER,

Plaintiff,

vs.

THE MOORE FILTER COMPANY (a Corporation),

Defendant.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing sixty-one (61) pages, numbered from 1 to 61, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said District Court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of preparing and certifying the transcript of record on writ of error in this cause amounts to the sum of $36.10; that said sum was paid by the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 18th day of August, A. D. 1916.

[Seal] WALTER B. MALING,

Clerk United States District Court, in and for the Northern District of California.

[Ten Cent Internal Revenue Stamp. Canceled Aug. 18/16. W. B. M.] [62]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Moore Filter Company, a Corporation, Plaintiff in Error, and J. L. Taugher, Defendant in Error, a manifest error hath happened, to the great damage of the said Moore Filter Company, a Corporation, Plaintiff in Error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at

the City and County of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By ————————,
Deputy Clerk. [63]

Allowed by:

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy of the within Writ of Error is hereby admitted this —— day of ———, 1916.

————————,
Attorney for Defendant in Error.

The answer of the judges of the District Court *of the District Court* of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of

Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ attached as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk. **[64]**

Receipt of a copy of the within Writ of Error is hereby admitted this 13th day of April, 1916.

J. L. TAUGHER,
Defendant in Error.

[Endorsed]: No. 15,832. In the District Court of the United States, in and for the Northern District of California, Second Division. Moore Filter Company, a Corporation, Plaintiff in Error, vs. J. L. Taugher, Defendant in Error. Writ of Error. Filed Apr. 15, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to J. L. Taugher, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein

Moore Filter Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 12 day of April, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge.

United States of America,—ss.

On this the 13th day of April, in the year of our Lord one thousand nine hundred and sixteen, personally appeared before me, Henrietta Harper, a notary public, the subscriber, A. J. Mathews, and makes oath that he delivered a true copy of the within citation to J. L. Taugher, at his office in the Mills Building, San Francisco, California.

A. J. MATHEWS.

Subscribed and sworn to before me at San Francisco, this 13th day of April, A. D. 1916.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California. [65]

[Endorsed]: No. 15,832. In the District Court of the United States, in and for the Northern District of California, Second Division. Moore Filter Company, a Corporation, Plaintiff in Error, vs. J. L.

Taugher, Defendant in Error. Citation on Writ of Error. Filed Apr. 15, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2843. United States Circuit Court of Appeals for the Ninth Circuit. Moore Filter Company, a Corporation, Plaintiff in Error, vs. J. L. Taugher, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 19, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MOORE FILTER COMPANY, a Corporation.
Plaintiff in Error,

vs.

JOHN L. TAUGHER,
Defendant in Error.

Order Enlarging Time to June 1, 1916, for Filing Record.

It appearing to the Court that the plaintiff in error has heretofore prepared and served its proposed bill of exceptions in the above-entitled action and that the

defendant in error has served his proposed amendments thereto, and that the said proposed bill of exceptions and said proposed amendments have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said bill of exceptions has not yet been settled, and good cause appearing therefor,

IT IS HEREBY ORDERED, that said plaintiff in error may have and it is hereby granted to and including the 1st day of June, 1916, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk.

Dated May 11th, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 2843. In the United States Circuit Court of Appeals for the Ninth Circuit. Moore Filter Company, a Corporation, Plaintiff in Error, vs. John L. Taugher, Defendant in Error. Order Enlarging Time for Filing Record. Filed May 11, 1916. F. D. Monckton, Clerk. Refiled Aug. 19, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MOORE FILTER COMPANY, a Corporation.
Plaintiff in Error,
vs.
JOHN L. TAUGHER,
Defendant in Error.

Order Enlarging Time to June 30, 1916, for Filing Record.

It appearing to the Court that the plaintiff in error has heretofore prepared and served its proposed bill of exceptions in the above-entitled action and that the defendant in error has served his proposed amendments thereto, and that the said proposed bill of exceptions and said proposed amendments have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said bill of exceptions has not yet been settled, and for good cause appearing therefor,

IT IS HEREBY ORDERED, that said plaintiff in error may have and it is hereby granted to and including the 30th day of June, 1916, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk, twenty-one (21) days having been granted by Court, and no time by counsel.

Dated June 1, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 2843. In the United States Circuit Court of Appeals for the Ninth Circuit. Moore Filter Company, a Corporation, Plaintiff in Error, vs. John L. Taugher, Defendant in Error. Order Enlarging Time for Filing Record. Filed Jun. 1, 1916. F. D. Monckton, Clerk. Refiled Aug. 19, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MOORE FILTER COMPANY, a Corporation.
Plaintiff in Error,
vs.
JOHN L. TAUGHER,
Defendant in Error.

Order Enlarging Time to July 20, 1916, for Filing Record.

It appearing to the Court that the plaintiff in error has heretofore prepared and served its proposed bill of exceptions in the above-entitled action and that the defendant in error has served his proposed amendments thereto, and that the said proposed bill of exceptions and said proposed amendments have heretofore been delivered to the clerk of the District Court of the United States in and for the Northern District of California, Second Division, but that said bill of exceptions has not yet been settled, and for good cause appearing therefor,

IT IS HEREBY ORDERED, that said plaintiff in error may have and it is hereby granted to and including the 20th day of July, 1916, within which to file the record in the above-entitled action with the clerk of the above-entitled court at San Francisco, California, and to docket said case with said clerk, fifty-one (51) days having been granted by Court, and no time by counsel.

Dated June 30th, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 2843. In the United States Circuit Court of Appeals for the Ninth Circuit. Moore Filter Company, a Corporation, Plaintiff in Error, vs. John L. Taugher, Defendant in Error. Order Enlarging Time for Filing Record. Filed Jun. 30, 1916. F. D. Monckton, Clerk. Refiled Aug. 19, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

MOORE FILTER COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN L. TAUGHER,
Defendant in Error.

Order Extending Time to August 19, 1916, to File Record on Writ of Error and to Docket the Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the plaintiff in error may have to and including the 19th day of August, 1916, in which to file the record on writ of error and to docket the cause.

Dated July 20, 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: No. 2843. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to August 19, 1916, to

File Record Thereof and to Docket Case. Filed Jul. 20, 1916. F. D. Monckton, Clerk. Refiled Aug. 19, 1916. F. D. Monckton, Clerk.

No. 2843. United States Circuit Court of Appeals for the Ninth Circuit. Four Orders Under Rule 16 Enlarging Time to and Including Aug. 19, 1916, to File Record Thereof and to Docket Case. Refiled Aug. 19, 1916. F. D. Monckton, Clerk.

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No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. R. PRINGLE,
CLARENCE A. SHUEY,
Attorneys for Plaintiff in Error.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Before entering into a discussion of the merits of this cause we call to the attention of this court a remarkable condition of affairs. Defendant in error, Taugher, has obtained judgment in the District Court for the Northern District of California, against plaintiff in error, a Maine corporation with its place of business in New York, upon substituted service made upon one who was and is a rival in business of plaintiff in error, one who was the witness relied upon by defendant in error to prove his case, and one whose relations with plaintiff in error were not friendly at the time of service and trial. If the judgment rendered has been due to

false testimony, this court can grant no redress. On the other hand, if errors of law have been committed, it is plaintiff's right to seek and this court's duty to grant relief.

The facts show that plaintiff in error is a nonresident of this district; that the implied contract for the alleged services, if made at all, was made without the State of California; and that the services, if performed at all, were performed without the State of California.

It is a rule of law, the last enunciation of which is Fry v. Denver etc. Co., 226 Fed. 893, that a federal court acquires no jurisdiction over a nonresident defendant on substituted service of process, where the acts complained of were performed or committed without the district wherein the suit is commenced. Plaintiff in error first presented this lack of jurisdiction at the time of the opening statement of defendant in error (Tr. pp. 31, 32). At that time, and in taking jurisdiction, the learned justice presiding expressed his reason for so doing in the following words:

> "I recognize that the plaintiff is in a critical situation here; his case is prepared for trial; a dismissal at this time would necessarily postpone the opportunity to have a trial until after the question of the correctness of my ruling would have been determined by the Court of Appeal. That might be a year hence. The evidence might be lost. I have considered the matter not only as it has been discussed here in the courtroom, but likewise in my chambers, and I am rather inclined to think that in view

> of the fact that it cannot hurt anybody to take the evidence in this case and let the jury pass upon the fact, and the question as to the jurisdiction of this court can be readily disposed of on a motion for a new trial or on an objection to judgment upon the verdict as it can be now. * * * You may go on with your evidence." (Reporter's notes, p. 14.)

Plaintiff in error renewed its objection to jurisdiction at the conclusion of the case of defendant in error which motion, like that previously made, was denied (Tr. p. 50). As both these specifications of error, viz., one and eight, deal with the same question, i. e., jurisdiction, and upon the same state of fact, they may be considered together.

Pages 31 and 32 of the transcript show that the reason given by the District Court for holding that it had jurisdiction was that plaintiff in error had included in its answer, by way of a counter claim arising out of the same transaction, an indebtedness in its favor and as against defendant in error to the amount of $7500.

This court must at all times bear in mind that the answer of plaintiff in error, both as to those portions thereof which deal with denials of defendant in error's case, as well as those that deal with said indebtedness of defendant in error to plaintiff in error, contains a reservation as to the jurisdiction. It is said in one place (Tr. p. 13):

> "Now comes the defendant, the Moore Filter Company, and without waiver of its objection that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it

> or over the subject matter of this action, which said objections and the several benefits thereof are specifically reserved to it, and also specifically reserving all of its rights under motion to quash service of summons in this action heretofore made by it and denied by this court, makes answer and says."

In the other (Tr. p. 15):

> "Further answering the complaint of the plaintiff and each and every of the three causes of action therein set forth, saving and reserving, nevertheless, the objections and exceptions hereinbefore stated, and by way of counter claim, the defendant alleges."

Plaintiff in error is free to confess that it is the general rule that where one goes into a court and in addition to a denial of plaintiff's cause of action asks relief in his favor as against plaintiff, that he has by so doing invoked the jurisdiction of the court and cannot at a later date complain.

> Merchants Heat & Light Co. v Clow, 204 U. S. 286.

There are certain exceptions to the general rule and it is our contention that plaintiff in error comes within one of the same. Before entering into a discussion of the principles of law here involved, it is well to analyze the pleadings as set forth in the record before this court.

Defendant in error alleges by his complaint:

1. That he is a citizen of the State of California, residing in the City and County of San Francisco;

2. That plaintiff in error is a corporation existing under the laws of the State of Maine, and having its principal place of business in said state; that plaintiff in error has an agent in the City and County of San Francisco and does business therein;

3. That the amount in controversy exceeds the sum of $3000;

4. That at certain times, but not at certain places, save and except as herein stated, services were performed by him for the benefit of plaintiff in error.

Amongst these services is specified the obtaining of a judgment by confession for infringement of patent in favor of plaintiff in error and against Golden Cycle Mining Company. A copy of the decree was introduced in evidence (Tr. pp. 40 et seq.), and it appears therefrom that the confession of judgment was obtained in the District Court for the Southern District of West Virginia. Note, however, like the other items of service alleged, there is nothing to show by the bill of complaint as to where the service was performed.

As to this confession of judgment, it is further alleged that there was a special contract by which defendant in error was to be paid twenty per cent of all moneys recovered.

As above stated, the complaint in no place alleges the place of performance of the various services enumerated and nowhere in the complaint is there an allegation as to the time or place where any

contract, express or implied, for the payment of these services, was entered into, save and except that as to the confession of judgment against the Golden Cycle Company. A copy of this contract for compensation is attached to the complaint and contains, preceding the date, the words, "Colorado Springs, Colo.". Then follows in the complaint the enumeration of the services alleged to have been performed, which services plaintiff states to have been of the reasonable value of $26,100, no part of which has been paid except $10,000, paid under the special contract in connection with the Golden Cycle Mining Company, and the further sum of $2500, leaving a balance due of $13,600.

To the complaint plaintiff in error made answer denying performance of the services and then alleged "by way of counter claim" that at a certain time, while defendant in error was acting as its president, he caused it to pay him the sum of $12,500 in satisfaction of a pretended indebtedness; that at this time it was not, and was not at any other time, indebted to defendant in error in the sum of $12,500, but on the contrary that the total actual and bona fide indebtedness of the defendant to plaintiff upon all the lawful claims against it did not exceed the sum of $5000 in the aggregate; that "the matters hereinabove set forth arise out of the same transactions set forth in the complaint as the foundation of plaintiff's claim and are connected with the subject matter of this action; wherefore, the defendant prays judgment that the plain-

tiff take nothing and that the court give judgment against said plaintiff and in favor of said defendant in the sum of $7500, together with interest thereon."
* * *

As above stated, we concede the general rule as set forth in Merchants Heat & Light Co. v. Clow, supra. The Merchants case was decided under the laws of Illinois, and it is apparent that whatever was said by the court in reference to the effect of asserting a counter claim by a defendant must have been said in view of the Illinois statute. We are here dealing with a California case and we must consider the California law.

Section 439, C. C. P., reads:

> "If the defendant omits to set up a counter claim upon a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

Before entering into a discussion of the necessity on the part of counsel for plaintiff in error to set up by way of set off or counter claim the improper payment to himself by defendant in error of the sum of $7500, we make trespass upon the time of this court by reference to decisions of the Supreme Court of the State of California upon the law of this state as set offs and counter claims.

Machado v. Borges, 170 Cal. 501:

> "Plaintiff is *not* precluded from asserting his right of set off by his failure to set up his notes by way of counter claim in the suit brought

> against him by Borges. The mutual demands did *not* arise out of the same transaction, and cause of action on the notes was therefore *not* affected by the omission to make it the basis of a counterclaim."

Here we have the converse of the instant case. By argument, it follows that if plaintiff in error had failed to set up its set off or counter claim against defendant in error it would forever have lost its right to do so.

In Brosnan v. Kramer, 135 Cal. 36-40, it is said:

> "The provision of the code which bars a counter claim, unless set up in an action against the party in whose favor it exists, refers to a 'cause of action arising out of the same transaction set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action.' (C. C. P., Sec. 438, sub. I, and Sec. 439.) Pomeroy on Remedies and Remedial Rights (page 802), in discussing the meaning of this provision of the code, said: 'Undoubtedly the codifiers and the legislature, in drawing and adopting the first subdivision, had in mind the doctrine of recoupment, and so framed the language that it should include cases of recoupment and all others, legal and equitable, analogous to it; that is, all cases in which the right of action of the plaintiff and that of the defendant arise from the same contract. * * * *The central idea of this subdivision, then, is that one and the same contract is the basis of both parties' demand for relief.*'"

This view, that is, that it is the one and same contract that is the demand for relief, and which contract we might say in passing came before the court by defendant in error's complaint, is sub-

stantiated by the opinion rendered in Lee v. Continental Ins. Co., 74 Fed. 424. The syllabus therein reads:

> "A counter claim of the class which defendant is required by legal statute to present in the original action on pain of being forever barred from making it (C. C. P. Utah, sec. 3228) is a part of the matter in dispute and is to be added to the amount sued for by plaintiff in determining the jurisdictional amount."

In the opinion of the Supreme Court of the State of California, rendered in Griswold v. Pieratt, 110 Cal. 259, the facts show that Griswold, as plaintiff, maintained an action against defendant for damages by reason of work improperly performed, which were alleged in an amount sufficient to give the superior court jurisdiction. Pieratt, the defendant, set up by way of set off or counter claim a certain draft that Griswold had drawn in his favor for an amount as to which the Justice Court had jurisdiction. The trial court gave judgment in favor of Pieratt and awarded him the amount of the set off claimed. In holding this was error, and in deciding that the set off or counter claim of less than three hundred dollars could not be availed of, because the draft held by Pieratt did *not* arise out of the same transaction, it is said:

> "Of course, what is here said on the subject of jurisdiction has no application to the counter claims provided for in the first subdivision of section 438 of the Code of Civil Procedure; the amount of the cross demand under that subdivision is of no moment for jurisdictional purposes; our remarks are to be understood

> as confined to the unconnected causes of action mentioned in the second subdivision of that section, and limited also to cases presenting the substantial features of the present. If the set off, less than three hundred dollars in amount, exclusive of interest, held by a defendant, is pleaded by him as purely defensive matter in reduction or extinguishment of the claim of plaintiff in an action triable by the superior court, it may well be that the court can properly entertain the same; such was the case of Hart v. Cooper, 44 Cal. 77. It is under the statute (C. C. P. 440) perhaps as much a matter of defense merely as would be a plea of payment of a like sum."
>
> Freeman v. Seitz, 126 Cal. 291.

This case again forcefully illustrates the rule in this state, viz., that it is the cause of action as set forth in plaintiff's complaint that gives or takes from the court jurisdiction. In the Freeman case plaintiff sought to recover for beef furnished to defendant to the value of $1500 odd.

> "The defendant answered and without denying any of the allegations of the complaint alleged as a *counter claim* that at the time of the commencement of the action the plaintiff was indebted to defendant in the sum of $110.89 for beef furnished by defendant to plaintiff at his request."

Plaintiff demurred to the complaint upon the ground that the court had no jurisdiction of the subject matter of the counter claim, the same being for less than $300. The court sustained the demurrer and defendant went up on appeal after refusal to amend. In holding that the demurrer was erroneously sustained, it is said:

"Our code (Code of Civ. Proc. sec. 437) provides that the answer of the defendant shall contain a statement of any new matter constituting a *defense or counter claim;* that (Code of Civ. Proc. sec. 438) 'in an action arising upon contract, any other cause of action arising upon contract and existing at the commencement of the action;' that (Code of Civ. Proc. sec. 440) 'when cross demands have existed between persons under such circumstances, that if one had brought an action against the other, a *counter claim* could have been set up, the two demands shall be deemed *compensated,* as far as they equal each other.' This action is one arising upon contract, and the counter claim is also one arising upon contract and existing at the commencement of the action, and is clearly within the provisions of the code above quoted. The law abhors a multiplicity of actions, and the evident intent of the legislature in passing the code provision was that all matters that may be the subject of litigation between the parties within the limitations prescribed shall be settled in one action. * * * Pomeroy on Remedies and Remedial Rights, section 730, in speaking of our code provision says: 'It is clear that if the plaintiff's action was on a contract and for a debt—for the more extended language of the statute prescribes only a debt—and the defendant held another debt due from plaintiff personally and existing in his own favor, and which did so exist at the commencement of the action, he could plead such demand as a set off.' And in section 795 the same author, in speaking of the Code of Civil Procedure says: 'This is substantially the definition of a set off given in the codes of the second group. The language of this clause plainly includes all cases of counter claim based on contracts when the plaintiff's cause of action is also on contract.''

In Gregory v. Diggs, 113 Cal. 196, we find the following state of facts:

Plaintiff purchased potatoes from defendant; plaintiff paid the purchase price except $132. For this sum defendant brought action against plaintiff in the Justice Court; plaintiff (defendant in the Justice Court) set up a counter claim for $525, alleging breach of warranty. This plea was stricken out by the justice on the ground that he had no jurisdiction, the demand being for more than $300. Plaintiff then brought his suit in the Superior Court, asking that the justice be enjoined from proceeding with the case pending before him and that the entire matter be litigated in the Superior Court. The Superior Court refused to grant the injunction and plaintiff took an appeal. In reversing the order of the Superior Court refusing to grant the injunction, it is said:

> "In the complaint plaintiff claims damage in the sum of $525 for the alleged violation of the contract of sale, and if their right to an injunction is sustained, the effect will be to compel the plaintiff in the Justice's Court to plead his demand in the Superior Court as a counter claim and to permit the whole controversy to be tried there. * * * If the *counter claim* sought to be set up did not grow out of the same transaction and did not involve a trial and determination of the same precise issue, so that determination of one case could be pleaded as a bar to the other, the case would be different."

With the code of California and these decisions of the Supreme Court of California before him,

could learned counsel for plaintiff in error have done aught but assert, by answer, in addition to his denial of defendant in error's cause of action, his second defense, viz., his right of set off or counter claim?

Conceding for argument's sake that the cause of action as stated by defendant in error was with merit, and that the sole defense of plaintiff in error was that of his set off or counter claim, we ask this court to consider, where would plaintiff in error have stood after the judgment in the action at bar had become final? He could not have succeeded in a suit on the set off or counter claim for the answer would have at once been the above quoted section 439 of our Code of Civil Procedure. In other words, plaintiff in error was placed in this dilemma. He, himself, knew that the district court, by reason of the substituted service, was without jurisdiction. The failure of jurisdiction did not, however, appear upon the face of the complaint and a demurrer would have been unavailing. Plaintiff in error was therefore forced to elect, *not voluntarily, but under compulsion,* by reason of the law of this state, to either assert its set off or counter claim and thereby be met with the objection made in the District Court, or at its peril fail to plead the set off or counter claim and take the consequences. In this connection we call to the attention of the court that defendant in error, Taugher, alleged himself to be a citizen of this state and a resident thereof. The action was

brought in the District Court of the United States of this district and therefore the provisions of said section 437, C. C. P., undoubtedly apply in the instant case. Not only this, but any subsequent action by plaintiff in error against Taugher would have to be brought in the state or federal courts here.

A situation analogous to that presented here is found in Fry v. Denver etc. Co., supra. There the want of jurisdiction appeared upon the face of the complaint. Objection to jurisdiction was presented by demurrer which included, in addition to want of jurisdiction, certain grounds which went to the merits of the pleading. The portion of the opinion in the Fry case germane to the situation here reads as follows:

> "It is urged that defendant should be held to have waived its objection by coupling with it other grounds of demurrer invoking the exercise of jurisdiction within the principles of Western etc. Co. v. Butte etc. Co., 210 U. S. 368. The (California) Code of Civil Procedure, section 430, provides various grounds of objection to a complaint which must by express requirement be taken if at all by demurrer where they appear on the face of the pleading. The first is 'that the court has no jurisdiction of the person of the defendant or subject of the action,' followed by others going to both substance and form. No other mode is provided for raising these objections. The defendant's demurrer conforming to these requirements opens with the objection to jurisdiction and then in order doubtless that that may not be waived should his objection fail, includes others. *It would be a harsh rule under such a pro-*

cedure to hold that where a party desires to raise the objection of want of jurisdiction he must to avoid being held to have made a general appearance, take the hazard of the sufficiency of that objection by waiving all others; for the code does not contemplate dividing up the grounds of demurrer piece-meal. The several grounds relied on must all be stated in the same pleading. There is no provision to be found in the statutes of this state similar to that of section 1820 of the Montana code involved in the Western Loan Company case; and I don't think, therefore, that the same rule of waiver can justly obtain against the defendant as was there invoked. York Co. v. Abbott, 139 Fed. 988."

The material portion of the York case referred to in the above quotation from Fry v. Denver etc. Co., supra, reads:

"After the motion to dismiss was refused Abbott demurred, as we have said, but in the demurrer she stated that she appeared specially for the purpose, did not submit to the jurisdiction of the court, and did not waive her objection to the jurisdiction theretofore taken by her motion to dismiss and she added that she expressly insisted on that objection. Inasmuch as she first appeared to move to dismiss and the motion to dismiss was refused, a subsequent appearance by her on demurrer cannot be regarded as *voluntary* and must be held to have been *forced* by the refusal to dismiss, so that thereby her motion to dismiss was not waived. Her appearance was not an appearance within the meaning of the eighth section of the act of March 3rd, 1875, and all questions of jurisdiction which might have been raised under the motion to dismiss are now available as of the time of that motion. All this was

fully settled in Southern Pacific Co. v. Denton, 146 U. S. 202, 204, 206, where a series of proceedings occurred precisely like those at bar."

In Central etc. Exchange v. Board of Trade, 125 Fed. 463, 469, it is said:

"It is indeed said by some courts that one objecting to the jurisdiction of the court must keep out of the court except to object to its jurisdiction and that an appeal from a judgment is a general appearance to the action. (Authorities.) This doctrine has not, however, obtained in the federal courts. It is true a party 'may not in the same breath dispute the merits of a cause alleged against him and deny the jurisdiction of the court over his person,' (Crawford v. Foster, 84 Fed. 939) but when a party appears specially to object to the jurisdiction or to move to set aside the service of process, he is deemed not to have waived the illegality of the service if after such motion is denied he answers to the merits. *Such illegality in the service is waived only when without having insisted upon it he pleads in the first instance to the merits.* In Harkness v. Hyde, 98 Fed. 476, it is said: 'Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when being urged it is overruled and the defendant is thereby *compelled* to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contest. It is only where he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

As has been heretofore stated, plaintiff in error objected to the jurisdiction of the court at the time of the opening statement of counsel for defendant in error, and again at the close of his case and also the opening paragraph of his pleading is an objection to jurisdiction. But there could be no opening statement of counsel and no case on the part of defendant in error without an answer, and, as heretofore stated, answer was necessary for the want of jurisdiction was not disclosed upon the face of the complaint. Plaintiff in error did all that it could when, and as a preamble to pleading its defense of set off or counter claim, it did so "without waiver of its objection that this honorable court had acquired and can lawfully exercise no jurisdiction over it or over the subject matter of this action, which said objections and the several benefits thereof are specifically reserved to it."

Plaintiff in error made its objection to jurisdiction at the first available moment. We cite:

Lehigh etc. Co. v. Washko, 231 Fed. 42,

wherein it was held that the objection that the court had no jurisdiction by reason of the fact that plaintiff was an alien rather than a citizen (the action being brought in the district wherein the plaintiff resided) was not waived by a failure on the part of defendant to delay presentation of the objection to jurisdiction until it appeared at the time of trial that plaintiff was in fact an alien.

In Merchants Heat etc. Co. v. Clow, supra, it is said:

> "We assume that defendant lost no right by pleading to the merits as required after saving his rights."

Citing

> Harkness v. Hyde and Southern Pacific Co. v. Denton.

The Merchants Heat Co. case was cited by defendant in error in its motion for affirmance of judgment, heretofore made to this court and denied. The application of the case lies in the fact that, like in the instant case, the defendant in that action pleaded "a recoupment or set off of damage under the same contract and overcharges in excess of the amount ultimately found due to the plaintiff," and that the Supreme Court held that by so doing it, defendant had invoked the jurisdiction of the court and could not, after judgment passed against it, assert a failure of jurisdiction.

At first blush the Merchants Heat case would seem to be against plaintiff in error. In reality it is a case which supports the views of law hereinbefore presented. To illustrate:

It is said in the opinion:

> "The authorities agree that he is not concluded by the judgment if he does not plead his cross demand; that whether he shall do so or not is left wholly to his choice. (Authorities.) *This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences.* The right to do so is of modern growth and is merely a

convenience that saves bringing another suit, *not a necessity of the defense.*"

In this state, to paraphrase the language of the Supreme Court, the rule would be:

> "The authorities agree that he is concluded by the judgment if he does not plead his cross demand and that whether he do so or not is not left wholly to his choice. *This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, does not assume the position of an actor, and if he does not do so he must take the consequences.*"

The Merchants Heat case arose in the Northern District of Illinois. The statutes of Illinois were before the court, and for the convenience of this court we quote the same:

> "Section 30. Set off (Sect. 29) The defendant in any action brought upon any contract or agreement, either express or implied, having claims or demands against the plaintiff in such action, may plead the same or give notice thereof under the general issue or under the plea of payment, and the same or such part thereof as the defendant shall prove on trial shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due, and if it shall appear that plaintiff is indebted to the defendant the jury shall find a verdict for the defendant and certify to the court to the amount so found, and the court shall give judgment in favor of such defendant with the costs of his defense. If the cause be tried by the court the findings and judgment shall be in like manner."

The distinction between the Illinois statute and the California statute is patent. In the former the

defendant in any action brought upon contract, express or implied, having claims, of any kind, whether upon contract or not, may plead the same. In California the statute reads:

> "A cause of action arising out of the transaction set forth in the complaint as a foundation of the defendant's claim or connected with the subject of the action." (Subd. I, sec. 438, C. C. P.)

The closing paragraph of the opinion in Merchants Heat & Light case reads:

> "As we have said, there is no question at the present day that by an answer in recoupment the defendant makes himself an actor and to the extent of his claim a cross plaintiff in the suit."

Citing

> Kelly v. Garrett, 6 Ill. 649;
> Ellis v. Cothran, 117 Ill. 458;
> Cox v. Jordan, 68 Ill. 560-565.

An examination of these three Illinois cases will show that the Supreme Court but followed the decision of the Illinois courts upon an Illinois statute. In Kelly v. Garrett it said:

> "In pleading a set off the defendant as to it assumes the attitude of a plaintiff and is bound to prove in relation to it the same facts as if he had instituted his action upon it."

Like language is found in the case of Cox v. Jordan, supra, and Ellis v. Cothran, supra.

As to Merchants Heat & Light Co. v. Clow, supra, it is respectfully submitted that the decision turns

upon the statutes of Illinois and upon the decisions of the courts of last resort of that state in reference thereto, or at best, the case deals with but the general rule, the exception being in states like ours wherein the statute makes *compulsory* the pleading of the counter claim or set off and does not leave to the litigant the option of pleading or not pleading the same as to his judgment seems advisable.

Reverting again to the opinion in the Merchants Heat case, we find the Supreme Court saying:

> "There is some difference in the decisions as to *when* a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none to the proposition that when he does become an actor *in a proper sense* he submits."

We have no quarrel with this rule of law, but we do contend:

(a) That the pleading of set off or counter claim by *answer* is not invoking the jurisdiction of a court and that when one so does he is not of necessity an actor; and

(b) That this is especially true when the defendant does not plead the same of his own volition but under *compulsion* and by reason of a statute which provides that unless he so do his rights shall be forever barred.

The distinction between the decisions of courts of California and those of Illinois lies in this: In California it is held, under subdivision one of section 438, Code of Civil Procedure, that when the

set off or counter claim arises out of the same transaction, it is the transaction or cause of action itself, and the failure on the part of the defendant to set up any defense that he may have to the cause of action, and arising out of the same transaction, like, for example, payment or set off, prevents him forever and a day from again litigating the *"same transaction"*. It is his duty to assert whatever defense he knows of, and if he fails to so do he cannot modify the judgment against him by maintaining a second suit upon a matter which it was his duty to have pleaded as a defense. Under no other theory can those decisions of the Supreme Court of this state that permit the pleading of and trying in a superior court of counter claims of less than three hundred dollars be upheld. If the counter claim or set off be a separate transaction, a transaction under which the one asserting it becomes an actor, how or in what way, we ask this court, can it be said that the superior courts of this state can take jurisdiction of a demand when the same is of less than three hundred dollars in value?

In Illinois the contrary rule exists. There a suit can be brought upon a promissory note and as against the prayer for relief the defendant can assert a claim arising for goods sold or services performed. The very statute which permits the setting up of a cross demand arising out of an entirely different transaction, a transaction as to which an action could be maintained by defendant irrespective of whether or no judgment passed for

or against him in the action first brought, explains the Illinois rule, and to the effect that as to this cross demand the one asserting it becomes an actor.

ASSIGNMENT OF ERRORS SIX AND SEVEN.

Before discussing the above assignment of errors, it becomes necessary to digress and call to the attention of the court certain portions of the pleadings in this case.

Defendant in error alleges in his complaint, and as part of the services performed, the following: Services rendered in and about and in connection with negotiations for the settlement of certain claims of the Moore Filter Company against the Golden Cycle Mining Company * * * which negotiations finally determined in a payment by the Golden Cycle to the Moore Company of $50,000 damages for infringement of such patent rights; and a confession of judgment of infringement thereof and the granting and conveying of certain other valuable considerations by the Golden Cycle to the Moore Company.

An analysis of this allegation will show an allegation of the performance of services of three kinds: First, the collection of $50,000 for damages for infringement of patent; second, a confession of judgment for infringement, and third, the granting and conveying of certain valuable concessions by the Golden Cycle to the Moore Company.

The complaint, after alleging the foregoing, proceeds to charge that plaintiff and defendant entered into a special contract relating to remuneration for services in relation to the claim of the Moore Company against the Golden Cycle, which contract is attached to and made a part of the complaint, and wherein it is alleged that Taugher was "entitled to receive, hold and have for his own use and benefit, for his services in connection therewith, twenty per cent of all moneys agreed to be paid and paid to the Moore Filter Company by the Golden Cycle Mining Company by way of settlement and compromise of such claims".

The complaint proceeds to allege further, that Taugher performed other valuable services in connection with the claim of the Moore Company against the Golden Cycle, and that the Golden Cycle rendered "certain other valuable considerations to the Moore Filter Company through the efforts and services of the plaintiff, for which services the defendant, the Moore Filter Company, is still indebted to plaintiff".

Taking up directly the assignment of errors, we find the witness Oliver testifying that he was engaged in the business of manufacturing and selling filters for cyanide process; that he had a general idea of the patent situation in the United States relating to filters; that he knew of the settlement with the Cycle Mining Company for $50,000; that it was announced in the technical journals. The record (page 46) shows the following:

"Mr. BLAKE (counsel for Taugher). Would you consider that the procuring and entry of that judgment against the Golden Cycle Mining Company in the United States Circuit Court for the Northern District of West Virginia, that being a district other than the third circuit, would be of value to the Moore Filter Company in making settlement with other infringers of the process of the Moore Filter Company in various parts of America and elsewhere?

"Mr. ROSENSHINE (counsel for plaintiff in error). We object to the question on the ground that Mr. Oliver is not competent to pass on the value of a confession judgment and also on the further ground that it is incompetent."

(Later follows exception.)

Following this there appears a discussion by counsel, and then:

"The COURT. The question includes more than that. If that is your objection alone I think it would not be good. What counsel is really asking you, Mr. Oliver, is this in substance: Whether from your knowledge of the business you would consider that a second adjudication of the validity of a patent where the patent had given rise to litigation growing out of infringements would be of value to one owning the patent in making further settlement with parties who had infringed the patent.

The WITNESS. Yes, I believe it would be of very vital importance for this reason, that every one who had experience in patent matters knows that an adjudication in one circuit means nothing more than the right to go and fight it out in some other circuit, because it is never final; whereas, if you get it in two circuits, the chances are very much better for a complete settlement of the case.

Mr. BLAKE. What value in your judgment was the confession of judgment to the Moore Filter Company?

Mr. ROSENSHINE. The same objection.

Mr. BLAKE (continuing). If the Moore Filter Company had made reasonable use of it in its negotiations and dealings with other mining companies that were infringers of its patents."

To this question on the part of counsel the witness Oliver made reply:

"It is a difficult matter to put in dollars and cents. It came at the psychological moment. The Moore Filter Company had won its suit against the Tonopah Belmont in another circuit and this was the first settlement that was made—the first large settlement they had gotten from infringers. The Tonopah Belmont case was still in court awaiting a judgment—waiting for the accounting—they had won the case.

The COURT. They had gotten the decree?

Answer. They had gotten the decree and were waiting for the accounting. This other was going on just at that time and getting an actual cash settlement meant a good deal to the outside world. They could see that if they did infringe the charges were pretty slim of their winning out."

It is urged here that the permitting of the witness to testify as to what he would consider the value to the Moore Company of the procuring and entry of a judgment against the Cycle Company, and in permitting the witness to testify directly to the question, "What value in your judgment was the confession of judgment?" was error in several ways.

First. It was permitting the witness to testify as to a matter immaterial to the issues as framed.

Second. The question was immaterial from another viewpoint. Taugher had been paid ten thousand dollars for these services and it was so alleged in the complaint (Tr. p. 5).

Third. The witness Oliver, when permitted to give a statement as to what in his judgment was the value of the confession judgment, obtained against the Cycle Company, was called upon to testify as an expert and upon a subject as to which he had no special knowledge.

Fourth. And finally, it was error to permit an expression of opinion as to value, for by permitting the witness to give his opinion there was taken from the jury the very issue that they were called upon to try, viz., the value of Taugher's services.

It is the theory of defendant in error, as conveyed by the question asked by Mr. Blake (Tr. p. 46), and the reason given by the court in permitting the answer (Tr. p. 47) that the obtaining of a second judgment even though by confession in a district different from that in which the first judgment for infringement had been obtained, viz., that against the Tonopah Belmont Company, made this second decree in some way of greater value to the Moore Company than it would have been if it had been the first decree obtained. This curious form of value is evident by the answer given by the witness, which answer could not have failed to have

impressed the jury to a degree disadvantageous to plaintiff in error. The answer reads (Tr. p. 47):

> "Yes, I believe it would be of very vital importance for this reason, that every one who has had an experience in patent matters knows that an adjudication in one circuit means nothing more than the right to go and fight it out in some other circuit, because it is never final, whereas if you get it in two circuits, the chances are very much better for a complete settlement of the case."

As to this portion of our discussion we must keep in mind the fact that Taugher is seeking compensation for services performed by him and that the measure thereof is not what the result thereof may bring to the plaintiff in error, but rather what Mr. Taugher is entitled to for his work done. To illustrate: If the writer herein should go to a tailor of experience and order a suit of clothes, the tailor would be entitled to receive for his work just what he would charge for like clothing for the average individual. The fact that the writer desired to appear particularly well for the purpose, perhaps, of taking his wife to the theatre, would be no reason why the tailor should charge him more for his work than he would have charged for clothes to be worn in the business world. Again, would it make any difference to the tailor that the clothes were for persons of distinction, like the members of this court rather than for an individual of mediocre ability?

It follows, therefore, that the question of whether or no this was the second judgment obtained on an

infringement, and therefore of possibly more potential value in settling claims of infringers, does not concern the issue, i. e., what defendant in error should receive as compensation for his services. If the theory of the learned trial judge be correct, a fifth judgment in a court of competent jurisdiction would be more valuable than a third, and so on until possibly the last judgment of infringement would be so valuable that one need but practice one case in his lifetime.

It cannot be said herein that the error was harmless, for certainly there was conveyed to the minds of the jury the thought that this judgment was of great strategic value and that by obtaining the same plaintiff in error had achieved a victory of a kind which meant a rushing for settlement by all infringers of the patent—a case of "Don't shoot, Kit, I'll come down".

As heretofore stated, defendant in error had been compensated for his services in connection with the Golden Cycle claim. The pleadings so allege, and to permit evidence as to services for which Taugher had been paid could not but confuse the jury, for how could they, without the pleadings before them, distinguish between services performed and paid for and those performed and not paid for? In short, in assessing the value of the services they must have of necessity taken into consideration the work done under the Golden Cycle claim paid for as aforesaid.

It is further submitted that when the witness Oliver was permitted to give a statement as to what in his judgment was the value of the confession judgment, he was giving an opinion upon a matter as to which he was not qualified. This court readily appreciates the distinction between judgments *pro confesso* and judgments on the merits, but Oliver was not advised as to the law; he was but a layman. To him a judgment was a judgment, no matter how obtained, and to permit this witness to tell the jury that this judgment of confession was of as great or possibly greater value than the judgment obtained against the Tonopah Belmont Company after a litigation strenuously fought, undoubtedly made the jury believe that a judgment's a judgment "for a' that". As a fact they are not. A judgment by confession admits nothing more than that the defendant in the action says that he has infringed a patent, but this is merely his opinion, which is not binding on the world at large. A judgment on its merits, that such and such patents have been infringed, in such and such a way, carries weight in every other tribunal. Not only this, but, as above stated, the question involved in the case was the value of Mr. Taugher's services. How can a layman, we ask, be comeptent to testify to the value of services performed by a lawyer? Is that not a question for lawyers themselves to determine, and are not lawyers the only experts who should be permitted to testify? In the early case of

Hart v. Vidal, 6 Cal. 56,

it is said:

> "Newland was an incompetent witness to prove the value of Hart's legal services; he was not a lawyer and therefore not such an expert as the rules of evidence admit."

See, also,

Hawley v. Smith, 108 Mich. 350.

Last but by no means least, it is urged that in permitting Oliver to testify as to the value of the services performed by Mr. Taugher, i. e., the value of the confession judgment itself, the court was taking away from the jury the fact in issue.

In Hastings v. Steamer "Uncle Sam", 10 Cal. 341, the facts show that Hastings was detained, and perhaps unduly and unlawfully, on the Isthmus of Panama.

> "To arrive at the damage sustained by the plaintiff by reason of his detention on the Isthmus the witness Hubbs was permitted against the objection of the defendant to give his estimate of the value of the plaintiff's services per day. These the witness placed as high as one hundred dollars a day. * * * The testimony was clearly improper. The opinion of witnesses is generally admissible only when they relate to matters of science, art or skill in some particular profession or business. *The estimate of the witness Hubbs was but his judgment from facts and could not be substituted for that of the jury.*"

If in the case at bar evidence had been introduced as to the value or number of the infringements, and the further fact that judgments had been obtained holding that persons operating in a manner similar to the infringers where responsible to plaintiff in

error in damage, then the jury could for itself determine the value of such judgments when obtained and the likelihood and probability of causing other infringers to settle their liability.

The testimony of Oliver was of the wildest speculation. He could only say that in his judgment and perhaps his experience, the fact that two courts had permitted the recovery of damages for infringements, would make other persons who were still infringing more likely to settle their claims. The jury were the essential judges of matters of this kind. It was for them to determine from the facts stated what the probabilities will be. No witness should ever be permitted to trespass upon this province of the jury. We are not here contending that expert testimony as to certain matters is not admissible. The point attempted to be elucidated is that a witness should never be permitted to give his opinion upon the very question that the jury is called upon to decide, to wit, in the instant case the value of Taugher's services. This is especially true as to matters which the layman—the man on the street—can decide as well as the expert.

The opinion of the witness Oliver as to the value of the confession judgment if based upon any data at all was upon data that it was perfectly easy for him to state to the jury, and from which if once stated an ordinary jury could make as just and fair a determination of the value of Taugher's services as could the witness Oliver himself. At best, the fixing of the value of the services was conjectural and the making of

this conjecture should have been by the jury and not by the witness Oliver. It is true that Oliver had stated his familiarity with the patent situation and matters relating to filters generally, but how can this court tell what was in the mind of the witness Oliver; what facts and what data he took into consideration when and in answer to the question as to value of the confession judgment he stated to the court and jury that the judgment was of great value?

Later (Tr. p. 49) it appears that Oliver placed the value of this judgment at from thirty to fifty thousand dollars. The condition of the record is such that we are foreclosed from an argument to the effect that the admission of this testimony was error. The testimony, however, is before this court as evidence of what value Oliver placed upon the judgment. In other words, this court can see that when the witness Oliver, in answer to the question objected to, replied: "It is difficult to put in dollars and cents. It came at the psychological moment," he had in mind a value in dollars and cents of from thirty to fifty thousand dollars.

This last quotation from the testimony of Oliver aptly illustrates the thought that is in the mind of the writer. The witness states that the confession judgment came at the psychological moment. We have heard of the psychological moment ever since the treaty that ended the Russo-Japanese war. We all are students of psychology. We submit, however, that none of us are experts on psychology. Oliver was no more competent to determine the

question of whether or no this confession judgment came at the psychological moment than was any one of the twelve men who sat on the jury. That Oliver's value as to this judgment is affected by the fact that he thought that the same came at the psychological moment is evident. But was it not the duty of the jury and not the duty of Oliver to determine whether or no the psychological moment had arrived? What facts, we ask, had Oliver in his possession that enabled him to determine the psychological moment? We submit that the value of Mr. Taugher's services was no greater because the judgment was obtained at the apt moment than if the same had been obtained months before or after the date that Mr. Oliver fixes as the "psychological moment".

Baltimore etc. Co. v. Sattler, 100 Md. 306-30:

> "The eighth exception was taken to the admission of certain testimony of Mr. Hook, who testified as an expert on the ventilation and construction of tunnels. The testimony objected to was this: That in his opinion the quantity of smoke cast on Mr. Sattler's land was increased by the existence of the tunnels in the neighborhood over what it would have been if there had been no tunnels there. It does not appear to us that the fact proposed to be proved by this witness is such testimony as can be given by an expert. The court, or any member of the jury, knew quite as well as the witness that, if the road ran all the way through an open cut, the smoke would be distributed all along the whole distance, and necessarily there could not be so much of it at any particular point. * * * The general rule, of course, is that facts, and not opinions, must

be given in evidence. Expert testimony is a well known exception to this settled rule; and the question, then, is whether the testimony just referred to is included within the exception. The rule in regard to the admissibility of expert testimony is well settled. In the case of Stumore v. Shaw, 68 Md. 19, it is thus stated by the late Judge Miller, who delivered the opinion of the court: 'There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts; or, stated in other words, if the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusion or inferences drawn by the jury.' * * * 'Where the question can be decided by such experience and knowledge as are ordinarily found in the common walks of life, the jury are competent to draw the proper inferences from the facts, without hearing the opinions of witnesses.' Turnpike v. Leonhardt, 66 Md. 73. Without undertaking to lay down any general rule, it appears to us, that certainly so far as the proof of the fact of damage is concerned, there ought not to be any doubt. It can hardly be said that it requires either special knowledge or skill to enable a witness who has seen the property in question, and who has observed the effect of the alleged injurious acts, to say whether the condition thereby produced is beneficial or otherwise. Strictly speaking, perhaps, no witness, whether expert or not, should be allowed to draw from the facts the conclusion that the property is damaged, for the jury are quite as competent to do that as the witness. * * * It is not desirable to enlarge the limits within which expert testimony is admissible, and whenever the ultimate facts desirable to be proved is, from the nature

of the issue, especially confided to the jury, such evidence should be rigidly excluded. The object for which the jury is sworn—that is to say, if they find there is damage—is to find the extent of it measured in dollars and cents. But to allow the expert to give such testimony not only puts him in the place of the jury, but permits him to indulge in mere speculation. Witnesses who are competent for that purpose may testify as to the value of the property before and after the alleged injury, but it by no means follows that the injury is the sole cause of the diminution, if any exists. Whether it is or not, or to what extent, is for the jury, and not the witness to determine. * * * But it has often been said that it would be inconsistent to hold that testimony as to the exact amount of damage is not admissible, and at the same time admit proof of value before and after the injury, leaving it to the jury only to make the simple calculation involved in subtracting the one value from the other. But the error of this view, we think, consists in assuming that that is the only duty the jury have to perform in this respect. We have already indicated our view in regard to the respective provinces of the jury and the witnesses in this important matter. In Railway Co. v. Gardner, 45 Ohio St. 323, the supreme court of that state held that the primary facts which enable the jury to determine the extent of the injury are the values of the land before and after the alleged tort. 'If it be contended,' said Chief Justice Owen, 'that when a witness has stated what, in his opinion, is the difference in value of the land before and after the location of the road, or how much less it is worth after than before, he has substantially stated the substantive fact to be ascertained (that is to say, the amount of damage), the obvious answer is that he is by this form of inquiry (that is, the inquiry,

> 'how much is the damage?') left to estimate in his own mind the amount of damages sustained, and give this to the jury as the difference in value. There is no assurance that he will, in making his estimate, take into account the actual value before and after the location of the road. Indeed, there is no assurance that he may have an intelligent opinion of the value of the land affected before or after such location, except that he has qualified himself in the opinion of the court as a witness.' *It is, of course, no answer to say that the witness may be cross examined, for that has never been considered a test of the competency of a witness or the admissibility of testimony.*"

Reference was made in the Baltimore case to the case of Roberts v. New York etc. Railroad, 128 N. Y. 464. In the Roberts case (one of the leading cases, if not the leading case, on this question of opinion evidence) the following question and answer were held objectionable:

> "To what extent, if at all, in your judgment, is the value of Mr. Roberts' four buildings—to what extent in your judgment is the value of that property damaged, if at all, by the presence of the structure and the running of the trains?"

We quote from the opinion:

> "The reason is that the rule of damage is a question of law and the witness upon such a question might adopt a rule of his own and hold the defendants responsible beyond the legal measure."

In passing, we ask what rule of his own, or any other person, did the witness Oliver adopt in determining the value of the confession judgment?

Continuing the quotation:

> "The present value of the property of the plaintiff can be proved by expert evidence. * * * They are facts which now exist, or which once existed; and, if the expert had knowledge of them, he should be permitted to state it. As to what the value would have been under wholly different circumstances, he knows and can know nothing, but must form an opinion wholly speculative in its nature, which opinion must be based upon data perfectly easy for him to state, and from which, when once stated, an ordinarily intelligent jury can draw just as fair an inference of the possible value as could the expert. And that very inference must in some way be drawn by the jury, for it is the question it is called upon to decide. The opinion of the expert, if of the least value, would have to be based upon an intelligent consideration and knowledge of the value of other property as nearly as may be similarly situated, in and about the same quarter of the town, and under nearly the same circumstances, but without the presence of a railroad of the nature of the defendants in front of the property. All this information he could easily impart to the jury. * * * When they are all stated, and past, and present values proved, the jury or the court will be as fully competent to draw the inference which it is its peculiar province and duty to draw as the expert."

In the brief of counsel in the Roberts case we find the following specifications of reasons why opinion evidence of the kind here under discussion should be excluded:

"1. It encroaches upon the functions of the jury or other appointed triers of fact.

2. It violates the rule that opinion evidence shall be received only in cases of necessity.

3. It involves a conclusion of the witness upon a matter of law.

4. The formation of such conclusion does not appertain to any science, art, trade or occupation known to mankind.

5. The matter is one upon which judges and jurors are as competent to pass as any witness when a necessary fact as to value and sources of value are placed before them.

6. Such conclusions are conjectural and can have no certain or definite basis of fact.

7. The admission of such evidence tends to induce an omission to prove the facts necessary for independent and intelligent decision of the question.

8. Such evidence cannot be decided or contradicted by proof of facts.

9. Such evidence affords an ample field for bias and corruption and is contrary to the policy of the law."

Western Union Co. v. Ring, 102 Md. 677:

> "There was error in the seventh and eighth exceptions with respect to the rulings therein set out. In the seventh exception a witness had testified that he knew plaintiff's premises and the trees to which the suit had relation; that he had seen that the trees had been cut—three walnuts and some cedars, and that the trees had been injured by the cutting. In the seventh exception, it appears he was then asked:

> 'Give to the jury an estimate of the damage that was done to them, whether they were your trees or the trees of anybody else,—what was the actual damage done to those trees by their being cut as you saw them?' Against the objection of the defendant the witness was permitted to give in exact figures his estimate or judgment of the damage. It was the function of the jury to give this estimate or judgment. The witness could go no further than to give the facts within his knowledge that had caused injury and the fact that damage had resulted."

After quotation from the Baltimore etc. Co. v. Sattler, supra, to the effect that it was error to have permitted experts to give their opinion as to the facts, as well as to amount of damage, the opinion in the Ring case proceeds:

> "If, therefore, the evidence set out in the exception now under consideration was intended to be offered as from an expert witness, nothing more needs to be said than that it is within the ruling of the case just cited. If the witness of whom the question objected to was asked was not intended to be qualified as an expert, then the evidence offered was not within the exception to the general rule which excludes opinion testimony, a rule the limts of which, it is intimated in the opinion just cited, ought not to be enlarged, and which we may here say is a most salutary one in its operation as a restraint upon testimony which otherwise too often would be the result more of bias, recklessness of statement, and mere speculation than of judgment calmly and intelligently applied to the relevant facts."

In conclusion we urge on the court that the witness Oliver should never have been permitted to give his opin-

ion on the value of the confession judgment. It is apparent that the answer could not have been founded on any fact or set of facts. No experience or comparison could assist in determining the value of the judgment, for in the words of the trial court (Tr. p. 47), the value of the default decree "was more or less potential—you might say, in a sense intangible, dependent upon the use which was made of the fact that such a decree had been procured". Again, "the value to the Moore Filter Company of this decree if further availed of by them for the purpose for which it was available".

The question dealt not with the past or the present, but rather the future, as to which naught but the Divine Being can foretell. In short, the question asked was unanswerable and therefore not subject to expert opinion for the answer could not be contradicted by proof of any set of facts.

That the testimony of Oliver was harmful to plaintiff in error, that by his evidence the jury unconsciously and undoubtedly placed a greater value on Mr. Taugher's services than they would have done if such testimony had not been before them, requires no argument or citation of authority.

Wherefore, it is respectfully submitted that the decree and judgment rendered in the above entitled cause should be reversed.

Dated, San Francisco,
October 28, 1916.

J. R. Pringle,
Clarence A. Shuey,
Attorneys for Plaintiff in Error.

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No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN L. TAUGHER,
Defendant in Error.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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Plaintiff in Error,

vs.

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

This was an action brought to recover the reasonable value of services performed prior to December 10th, 1913, in England, Colorado, New York and elsewhere by John L. Taugher, plaintiff in the Court below, for the Moore Filter Company, defendant in the Court below, and for plaintiff's expenses incurred in the performance of such services, and also for the value of services rendered by plaintiff while he was president of the Moore Filter Company, and for money paid out by him for the benefit of said defendant company, at its request.

The complaint states three separate counts or causes of action, the first claims for the reasonable value of the services performed by the plaintiff *prior* to the time he became president of the company and his expenses incurred in the performance of such services. The second count claims for the value of services rendered while president of the Moore Filter Company and the third count for money paid out by the plaintiff at the request of the defendant company and for its benefit.

The services sued for in the first count may be briefly described as

(1) Services performed by plaintiff in England and his expenses in connection with his journey to England and return.

(2) Services performed by plaintiff in New York in connection with the settlement made there by him with the Buffalo Mines Company, Limited, and expenses connected therewith.

(3) Services in connection with trip to Washington and expenses.

(4) Services in connection with the settlement made by plaintiff with the Golden Cycle Mining Company; these last mentioned services may be divided into three parts;

a. Services in connection with the said settlement whereby the plaintiff procured for the Moore Filter Company from the Golden Cycle Mining Company fifty thousand dollars in cash

(for this item of service plaintiff received in August, 1913, the sum of ten thousand dollars under the terms of a special contract relating to this special item of service (see pages 4 and 5 of Transcript, also page 8 thereof), and payment of which amount was authorized by a resolution of the board of directors of the Moore Filter Company long before the commencement of this action, to wit: in August, 1913 (Transcript pp. 24 and 25).

b. Services in connection with the procuring of a confession of judgment by the Golden Cycle Mining Company entered in the District Court of the United States for the Southern District of West Virginia, wherein that company confessed to the validity of the patent of the Moore Filter Company and acknowledged the infringement by it of that patent and acknowledged that the Golden Cycle Mining Company had profited by such unlawful use in the sum of fifty thousand dollars ($50,000.00).

c. Services in connection with the procuring of other valuable considerations which the Golden Cycle Mining Company undertook to turn over to the Moore Filter Company.

This action was commenced in the District Court of the United States for the Northern District of California on January 22nd, 1915, and personal service on the defendant was effected in the Northern District of California by service upon the

agent in charge of defendant's business in California in said District.

Motion to quash that service of process was made by the defendant in the Court below on various grounds, among them that the defendant was not doing business in California and that the United States District Court for the Northern District of California did not have jurisdiction of the defendant nor of the subject matter of the action. That motion was denied and in an opinion which is made a part of the record herein, Judge Van Fleet ruled that the Moore Filter Company was doing business in California at the time of service of process herein and that such service was properly made upon the defendant by service upon defendant's voluntarily appointed agent in charge of its business in California (Transcript pp. 29 and 30). No exception was taken to that ruling.

The defendant thereafter filed its answer to the merits and in addition to such answer set up a counter-claim praying that the plaintiff take nothing by his action and that the defendant be given judgment against the plaintiff in the sum of seven thousand five hundred dollars ($7,500.00). The action came on to be tried before Judge Van Fleet, sitting with a jury, on the 13th day of January, 1916, and evidence was introduced by both plaintiff and defendant, the trial proceeding until January the 20th, 1916, when the case was given to the jury under the instructions of the Court.

No objection of any kind was made to the charge of the trial judge to the jury and no exception of any kind was taken to it, and the jury returned a verdict on the said day in favor of the plaintiff for the sum of eighteen thousand three hundred and fifty-eight dollars ($18,358.00) and on said day judgment for said amount was duly entered in favor of the plaintiff and against the defendant.

Motion for new trial was thereafter made and denied.

The defendant then sued out a writ of error, filed its assignments of error and subsequent thereto settled its bill of exceptions.

The bill of exceptions so settled shows that but six (6) exceptions were taken to the ruling of the trial Court.

The assignments of error number fourteen (14), but only six (6) of those were based upon an exception, and but three (3) exceptions are before this Court for consideration and two (2) of these involve the same point, i. e. jurisdiction. Plaintiff in error's brief mentions assignment of error No. 7, but that was not based upon an exception.

Concerning the plaintiff in error's assignments of error or exceptions relating to the jurisdictional question argued in its brief, plaintiff in error on page 3 thereof states as follows:

> "As both these specifications of error, viz: one and eight, deal with the same question, i. e. jurisdiction, and upon the same state of facts, they may be considered together."

Since there are no *specifications* of error, it is impossible for the writer to tell exactly what plaintiff in error means by specifications of error one and eight, but it seems to be exception No. 1 and assignment of error No. 9 that deal with the same question, i. e. jurisdiction, and in that belief the further argument herein will proceed.

The manner in which the question of jurisdiction which is attempted to be raised by the first exception came about, was as follows:

After the opening statement of counsel for the plaintiff in the Court below, Judge Van Fleet himself suggested the question as to whether or not he had jurisdiction of the defendant or of the subject matter of the action, since it grew out of transactions which did not have their origin in this state and no part of which was performed in this state, and the service of process being in its nature a *substituted* one (which is apparently a mere *lapsus linguae* on the part of Judge Van Fleet, as he had already found in the action that there was personal service upon the defendant, since he had found that which amounts to the same thing, that the defendant was carrying on business in California and that service of process had been made upon the duly and voluntarily ap-

pointed agent of the defendant company in charge of its business in California. See Judge Van Fleet's opinion, Transcript pp. 29 and 30).

The matter was then argued at considerable length and it was then that Judge Van Fleet's own opinion in the case of Frye v. Denver & R. G. Co., 226 Fed. 893, was again thoroughly considered by him as well as the very important fact that defendant in the Court below had not only answered to the merits but in addition had filed a counterclaim asking affirmative relief in this action. Judge Van Fleet concluded that the District Court for the Northern District of California had acquired jurisdiction and he merely directed the case to proceed (Transcript pp. 31 and 32).

The defendant's counsel merely noted an objection to such direction to proceed with the case.

This matter was not raised at the time by objection of counsel for the defendant in the Court below, but on the contrary the matter was more in the nature of an argument between the Court below and the plaintiff there as to *whether a transitory cause of action could be tried in a state other than that in which the contract was made or the services performed.*

As plaintiff below pointed out to the trial Court and now again here submits, the question so suggested by Judge Van Fleet was conclusively determined by this Court in Denver & R. G. Co. v. Roller, 100 Fed. 738. Judge Van Fleet's holding

in Frye v. Denver & R. G. Co. seems to be to the contrary of the holding of this Court in Denver & R. G. Co. v. Roller. It was suggested that the Supreme Court in Old Wayne Mut. L. Asso. v. McDonough, 204 U. S. 222, and Simon v. Southern Ry. Co., 236 U. S. 115, had declared a doctrine contrary to the holding of this Court in Denver & R. G. Co. v. Roller. These Supreme Court cases were again carefully considered in the Court below, the plaintiff contending that the Supreme Court in each of these cases had expressly excluded from its opinion proceedings such as those dealt with by this Court in Denver & R. G. Co. v. Roller, and after such argument was concluded Judge Van Fleet ordered the trial to proceed (Reporter's notes, pp. 14 and 15).

In the quotation in plaintiff in error's brief concerning this matter, pages 2 and 3 (which quotation, by the way, is not taken from the Transcript of the case, but is taken from the Reporter's notes which are not made part of the Transcript), the plaintiff in error broke his quotation to omit, among others, the following statement of Judge Van Fleet in this connection:

> "The COURT. But if he (plaintiff) has a right to maintain it here, he need not be driven to the state of Maine. Of course, none of us are infallible; you will find as you go through life that you are bound to make mistakes; I am just as liable to make a mistake as anybody else. I have not such pride of opinion as would induce me to deny a man a right which

would grow simply out of my desire to sustain my own view. You may go on with your evidence."

It is submitted that such circumstances and proceedings did not raise in any way the question of jurisdiction of the trial court.

Moreover, *the question of jurisdiction had been settled in this action months before the trial commenced.* A motion was made to quash the service of process herein upon the defendant corporation on the ground that the Court had no jurisdiction of the defendant nor of the cause of action (see plaintiff in error's assignment No. 1).

That motion was argued at great length and Judge Van Fleet held as follows:

> "Under the terms of the contract between the witness Edwin Letts Oliver and the defendant (Moore Filter Company) the former was unquestionably constituted the agent of the defendant in this state and the evidence of the witness satisfies me that such relationship still subsisted at the time of the service of process herein * * * and the evidence shows that the relations of the parties to that contract were not terminated until subsequent to service of process in question. * * *
>
> "That Oliver was authorized under the terms of the contract to manage the affairs of the defendant so far as it was committed to him in this state, is, I think, well within the terms of the contract and that his business was such as to make service upon him effectual I think fairly appears.
>
> "The motion to quash will be denied."

The defendant took no exception to that ruling.

CONCERNING THE EFFECT OF DEFENDANT'S FAILURE TO TAKE AN EXCEPTION TO JUDGE VAN FLEET'S RULING THAT SERVICE OF PROCESS HEREIN ON THE DEFENDANT WAS GOOD AND THAT THE COURT HAD JURISDICTION OF THE DEFENDANT AND OF THE CAUSE OF ACTION.

When Judge Van Fleet made his order denying the motion to quash service of process and ruled that the United States District Court for the Northern District of California had jurisdiction of the defendant and of the cause of action, if the defendant wanted to obtain a review of that ruling in this Court it was necessary for it to take an exception to such ruling in accordance with the rules of the Court. When defendant in the court below failed to take an exception to the ruling, it is submitted that defendant must be held, by failing to take an exception to that ruling, to have acquiesced in it.

There is no question but that the United States District Court had general jurisdiction of the action, it being an action between citizens of different states and involving more than three thousand dollars.

Judicial Code, Section 51 provides:

> "* * * Except as provided in the six succeeding sections no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought *only* in

> the district of the residence of either the plaintiff or the defendant."

This action was brought in the residence of the plaintiff and therefore service could be legally made upon the defendant in this district, if defendant could be found and legally served in this district. *It was one of the two districts* in which the action could be brought.

If the defendant were not properly served in this district or if there was any informality or irregularity in such service, defendant could have waived the informality or irregularity in the service and have answered in this district, without question.

In In re Moore, 209 U. S. 490, the Court quoted from Interior Constr. etc. Co. v. Gibney, 160 U. S. 217, 219, as follows:

> "Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance without taking the objection."

The Court also quoted from Ex parte Wisner, 203 U. S. 449, as follows:

> "As the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect."

Proceeding further the opinion said:

> "So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court and if any objection arises to the particular court which does not run to the Circuit Courts as a class, that objection may be waived by the party entitled to make it."

The right of the Moore Filter Company to object to the jurisdiction of this Court was a right that could be waived by it. When defendant below failed to take an exception to Judge Van Fleet's ruling that it had been legally and properly served with process in the action in California and that the District Court of the United States for the Northern District of California had jurisdiction of the said defendant and of the cause of action, it waived any further right to object to that ruling and must be held to have acquiesced in it.

In Rodriguez v. United States, 198 U. S. 156-165, the Court said:

> "Whether this position be well taken or not we do not stop to consider; for, assuming that

> the motion in arrest of judgment was made in time, and assuming even that the court, as matter of law, erred in its interpretation of the statute, still the accused cannot avail themselves here of that error; for the record does not show any exception taken to the overruling of the motion in arrest of judgment. *By not excepting to the ruling of the court the accused must be held to have acquiesced in it, and to have waived the objection made to the grand jury.* We perceive no reason why they could not have legally waived an objection based upon the grounds stated in the motion."

This Court has held practically the same thing on several occasions. One of the recent holdings is in Dunsmuir v. Scott (C. C. A. 9th Cir.), 217 Fed. 200-202, where this Court said:

> "We are limited to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

See also

> Mexico International Land Co. v. Larkin (C. C. A. 8th Cir.), 195 Fed. 495.

Therefore, it is submitted:

That in an action between a citizen of California and a citizen of Maine, involving more than three thousand dollars ($3,000.00) brought in the District Court of the United States in and for the Northern District of California, that being the district of the residence of the plaintiff (Judicial Code, Section 53), and personal service made upon defendant by service upon defendant's voluntarily appointed agent in charge of the defendant's business in the

district of plaintiff's residence in California and motion to quash the service of such process having been made, and the judge of said District Court, after hearing both parties on such motion, having duly *found* that the defendant was doing business in California and that the corporation had been personally served in California (that is, service upon its voluntarily appointed agent in charge of its business in California) and as a necessary consequence that said Court had jurisdiction of said defendant and of the cause of action, *and no exception taken to that ruling,* the question of the jurisdiction of the Court in such action was finally settled and it is not open for review here.

The above, it is submitted, would in itself completely dispose of any question of want of jurisdiction of the Court below.

But in addition to that and to make the submission of the defendant to the jurisdiction even more certain (if such be possible), the defendant not only answered to the merits but set up a counter-claim asking that the plaintiff in the action take nothing by his complaint, but that the defendant be given judgment for seven thousand five hundred dollars ($7,500.00).

The Supreme Court in two recent cases has stated unequivocally that when the defendant sets up a counter-claim he himself invokes the jurisdiction of the Court in the same action and by invoking, submits to it.

In Merchants Heat & Light Co. v. Clow, 204 U. S. 286-289, the Court said:

> "By setting up its counter-claim the defendant became a plaintiff in its turn, invoked the jurisdiction of the court in the same action and by invoking submitted to it."
>
> * * * * * *
>
> "This single fact shows that the defendant, if he elects to sue upon his claim in the action against him, assumes the position of an actor and must take the consequences."

And in Texas & Pacific Ry. Co. v. Eastin, 214 U. S. 153, 159, the Court declared:

> "The single question in this court in that case (Merchants Heat & Light Co. v. Clow, supra) was the jurisdiction of the Circuit Court, from which the case came. The Merchants Heat & Light Company, an Indiana corporation, contended that no jurisdiction had been obtained over it by the service which was made upon one Schodd, who, it was asserted by the plaintiff in the action, was an agent of the company. A motion to quash the return of service was made and overruled, and thereupon the company, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract sued upon, and overcharges in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of $9,082.21.
>
> "Whether the company was doing business in the State of Illinois within the meaning of the statute of that state under which service was made, this court did not decide, but it did decide that the company, 'by setting up its counter-claim became a plaintiff in its turn, invoking the jurisdiction of the court in the same

> action, and, by invoking, submitted to it.' And this, notwithstanding the counter-claim arose, as it was said, 'out of the same transaction that the plaintiff sued upon and so to have been in recoupment rather than in set-off proper'."

The plaintiff in error devotes several pages of its brief in an attempt to maintain that the Supreme Court in Merchants Heat & Light Co. v. Clow, *supra,* was dealing with the statutes of Illinois, and plaintiff in error apparently contends that the rule of law declared in that case should be confined to actions coming from the State of Illinois, but the Supreme Court did not so confine the rule, but on the contrary stated is as a general rule of law.

In Texas & Pacific Ry. Co. v. Eastin, supra, the Supreme Court was dealing with a case coming from Texas and reaffirmed the rule declared in Merchants Heat & Light Co. v. Clow, making no reference whatever to the statutes of Texas or of Illinois on the matter of counter-claim.

The argument in the brief of plaintiff in error on the point does not seem to merit any further comment other than to submit that the rules announced by the Supreme Court in Merchants Heat & Light Co. v. Clow and Texas & Pac. Ry. Co. v. Eastin are general rules of law, applicable to cases generally.

Moreover, a glance at the counter-claim set up would show that the defendant was under no necessity of setting that counter-claim up in this action, for a separate suit in equity could have been maintained on it if there was any merit in it whatsoever.

but the trial of this action demonstrated that there was no merit whatever in the counter-claim and that the allegations therein contained were as a consequence false in fact and untrue.

The plaintiff in his complaint set out his services and asks for the reasonable value thereof and his expenses incurred in connection therewith and for the money paid out by plaintiff for the use and benefit of the defendant, claiming therefor the sum of thirty thousand eight hundred and fifty-eight dollars ($30,858.00) less the sum of twelve thousand five hundred dollars ($12,500) which he states he had received on account thereof prior to the bringing of such action and he asks for judgment for the balance owing to him, to wit; the sum of eighteen thousand three hundred and fifty-eight dollars ($18,358).

The counter-claim alleged that the whole services performed by plaintiff were worth only five thousand dollars ($5,000) and asked for a return of seven thousand five hundred dollars ($7,500) part of the twelve thousand five hundred dollars ($12,500) credited by the plaintiff in his complaint. And this absurd counter-claim was advanced notwithstanding the fact that this twelve thousand five hundred dollars ($12,500) has been received by said John L. Taugher nearly a year and a half before the commencement of this action. He first received two thousand five hundred dollars ($2,500) and subsequent thereto the sum of ten thousand dollars ($10,000) as per the terms of a special con-

tract concerning the fifty thousand dollars ($50,000) which he received from the Golden Cycle Mining Company, supra, pp. 2-3, the payment of which sum was ordered by the resolution of the board of directors on August 27th, 1913 (Transcript pp. 24 and 25).

The evidence introduced on behalf of the plaintiff documentary and oral, supported all of his allegations and the jury brought in a verdict for the full amount asked for by the plaintiff. So the counter-claim with its false and slanderous allegations was by the jury found to be false in fact and untrue.

On page 17 of its brief plaintiff in error states as follows:

> "As has been heretofore stated, plaintiff in error objected to the jurisdiction of the court at the time of the opening statement of counsel for defendant in error and again at the close of his case, and also the opening paragraph of his pleading is an objection to the jurisdiction. But there could be no opening statement and no case on the part of the defendant in error without an answer, and, as heretofore stated, answer was necessary for the want of jurisdiction was not disclosed upon the face of the complaint. Plaintiff in error did all that it could when, as a preamble to pleading its defense or setting up its counter-claim, it did so 'without waiver of its objection that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it or over the subject-matter of this action, which said objections and the several benefits thereof are specifically reserved to it."

If the situation were as plaintiff in error alleges it to be, to wit; that the defendant below objected

to the jurisdiction of the court for the first time at the time of the opening statement of counsel for plaintiff (the complaint stating that the plaintiff was a citizen and resident of California and the defendant a citizen of Maine), there is no question under the decisions that the raising of the jurisdictional question came too late, for the defendant had already filed an answer to the merits and had set up a counter-claim. That this is too late to raise the question of jurisdiction is supported by a multitude of authorities. A few are:

St. Louis & S. F. Co. v. McBride, 141 U. S. 127;

Western Land Co. v. Butte & Boston, 210 U. S. 368;

Lehigh Valley Coal Co. v. Yensavage (C. C. A. 2nd Cir.), 218 Fed. 547-549-550.

The matters arose, however, as in this brief are above set forth.

Therefore it is respectfully submitted that the question of jurisdiction attempted to be raised in this court is of no merit and is merely frivolous and raised for the purpose of delay only.

The only other matter argued in plaintiff in error's brief relates to the introduction of testimony by the witness Edwin L. Oliver, which it designated as assignments of error 6 and 7. Assignment 6 was not supported by an exception and will therefore not be further noticed.

Assignment No. 7 (based on exception No. 5) concerns the following question and answer:

> "Q. What value in your judgment was that confession of judgment to the Moore Filter Company—if the Moore Filter Company had made reasonable use of it in its negotiations with other mining companies that were infringers of its patents?"

To which the witness answered:

> "A. *It is a difficult matter to put in dollars and cents.* It came at a psychological moment. The Moore Filter Company had won its suit against the Tonopah-Belmont in another circuit, and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah-Belmont case was still in the courts, awaiting a judgment,—waiting for the accounting. They had won the case."

That is the whole testimony brought out in answer to the only question in this connection objected to and to which an exception was reserved.

The Court will see that the only pertinent part of the answer is: "It would be a difficult matter to put in dollars and cents."

How could any possible harm be done to the plaintiff in error by that answer?

In Central Vermont Ry. Co. v. Cauble (C. C. A. 2nd Cir.), 228 Fed. 876, 879, in answer to an objection of similar merit the Court said:

> "We do not find it necessary to pass upon the other exceptions taken to rulings of the court below upon minor questions. If some

> of the rulings were erroneous, they were of so trivial a nature as to render the errors, if any there were, negligible. For example, no damages to eyesight was claimed in the complaint, nevertheless plaintiff was asked on direct examination if 'anything was the matter with her eyes after the accident.' This was excepted to; but, as the answer was, 'I don't know', no possible harm was done, and the exception is simply academic."

Moreover, in this case Oliver was shown to be a man peculiarly qualified to testify to the value of that judgment. His qualifications to testify as to the value of that judgment to the Moore Filter Company were gone into at great length (Transcript, pp. 44 and 45), but the only pertinent part of the answer he made to the question excepted to was: "It would be a difficult matter to put in dollars and cents." Defendant in error refrains from discussing this trivial objection further on the ground that the question was perfectly proper if it had brought forth any pertinent testimony, but since in effect the only answer it brought forth was: "It would be a difficult matter to put in dollars and cents", further discussion of the point would seem to be undesirable.

It might be further noticed, however, that Oliver was not asked to testify as to the value of plaintiff's services in any particular, the statements to that effect in plaintiff in error's brief being entirely erroneous and unfounded in fact. In proving that particular item of service included in plaintiff's claim in connection with the Golden Cycle matter

and in order to enlighten the jury as to the kind of services performed by the plaintiff and the value of such services to the client, this testimony was introduced so that the jury might have further light on the matter and so that they could more intelligently fix the value of the services sued for by plaintiff, and Oliver was asked as to his opinion of *the value to the Moore Filter Company* of that judgment which plaintiff had obtained for it, if reasonable use was made of it in its negotiations with other infringers and he answered: "It would be a difficult matter to put in dollars and cents" (the balance of his answer merely explaining why it was a difficult matter to put in dollars and cents), *but Oliver was not asked at any time as to the value of plaintiff's services in procuring such judgment,* nor did Oliver testify to anything of the kind.

It is respectfully submitted that the contentions of plaintiff in error in this matter are entirely without merit and more than that, the plaintiff in error must have known that its contentions herein were entirely without merit and it is submitted that a reasonable conclusion to draw from the case is that the writ of error herein was sued out for the purpose of delay only.

Dated, San Francisco,
November 8, 1916.

Respectfully submitted,

JOHN L. TAUGHER,
Defendant in Error.

No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

J. R. PRINGLE,
C. A. SHUEY,
Merchants Exchange Building, San Francisco,
Attorneys for Plaintiff in Error and Petitioner.

Filed this .....*day of March, 1917.*

FRANK D. MONCKTON, Clerk.

By .....*Deputy Clerk.*

PERNAU PUBLISHING COMPANY

No. 2843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

MOORE FILTER COMPANY (a corporation),
Plaintiff in Error,

vs.

J. L. TAUGHER,
Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error petitions the above court for rehearing after judgment affirming that of the court below.

The reasons given for the ruling by this court are set forth in an opinion, a copy of which accompanies this petition. As stated in said opinion, plaintiff in error sought reversal upon two grounds:

the services alleged to have been performed, there is no allegation as to place of performance. It is true that as to some of the services spoken of they are described as "negotiations by the plaintiff in London * * * and in connection with and incident to a journey by plaintiff from New York to Washington, D. C.", but this is very far from stating facts in the complaint of a character that would permit of a demurrer for want of jurisdiction. In other words, it cannot be said that it affirmatively appears from the face of the complaint that all the services alleged to have been performed were rendered elsewhere than in the State of California, and we respectfully submit that this court is not justified in the statement that it was *inferable* that all services were performed without the state, or in deciding that plaintiff in error has waived the right to object to jurisdiction by not presenting a demurrer upon the ground of want of jurisdiction.

It must be conceded by this court that prior to answer plaintiff in error moved to quash service of process for want of jurisdiction in the court below, and it must also be conceded by this court that in the answer filed by plaintiff in error there was a general objection to jurisdiction and a statement that the answer was filed with reservation of right to object to jurisdiction. This court must also admit that after the opening statement of counsel for defendant in error the learned judge

of the court below considered that plaintiff in error had so far protected its right of objection to jurisdiction as to permit of again presenting the question of want of jurisdiction, for we find in the record (page 32) a statement that the court itself suggested the question as to whether or not it had jurisdiction of the defendant, the cause of the action growing out of a transaction which did not have its origin in the State of California. And it is a further fact, that in ruling that it had jurisdiction this same judge said: *"The question as to the jurisdiction of this court can be readily disposed of on a motion for a new trial or on an objection to judgment upon the verdict".*

It is also true that at the conclusion of defendant in error's case, plaintiff in error moved to dismiss the action for want of jurisdiction, which motion was considered by the court below and ruled on. In short, *the judge of the trial court and defendant in error both believed that plaintiff in error had at all times protected its right to object to jurisdiction,* and it is not until we come into this court, upon a record *prepared as directed by the judge of the court below,* on the settlement of the bill of exceptions, and which record the judge himself deemed sufficient to present all the rights of plaintiff in error, that it is said that plaintiff in error has lost or waived its right to raise this question of jurisdiction.

RIGHT TO OBJECT TO JURISDICTION NOT LOST OR WAIVED BY PLAINTIFF IN ERROR.

Ever since the decision by this court in Denver & R. G. R. Co. v. Roller, supra, it has been the law that by virtue of the provisions of section 411, C. C. P., jurisdiction may be had over a non-resident corporation by the service of process within this state upon one who is the agent of such corporation. The Supreme Court by its ruling in Old Wayne v. McDonough, supra, and Simon v. Southern Railway Co., supra, has limited this obtaining of jurisdiction to acts contracted for or to be performed within the state. The constitutional question is clear and it may be said that the Supreme Court has read into the various statutes, such as our section 411, the words, "as to contracts made or to be performed within the state".

It follows, therefore, that on a motion to quash service of summons, where the same has been made by substituted service, there is always presented the question of how far the corporation can be held to answer; that is to say, in addition to the determination of the question of fact, viz., is so and so the agent of the corporation, the court must look and see how far the statute has gone in permitting substituted service, and if it finds that this substituted service cannot be had as to transactions arising without the state, why then there is no authority for the calling of the corporation to answer. In short, the question is, and only is,—Has the court jurisdiction over the person of the defend-

ant?—and not as would seem suggested by the record in this cause (page 32),—Has the court jurisdiction "of the subject matter of the action"?

This court in its opinion rendered recognizes the fact that at the beginning of the answer to the complaint appears the following:

> "Now comes the defendant, the Moore Filter Company, and without waiver of its objections that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it, or over the subject matter of the action, which said objections and the several benefits thereof are specifically reserved to it, etc. * * *"

Evidently it is the opinion of the court that this reservation as to jurisdiction was not sufficient in itself to permit plaintiff in error to present the question of jurisdiction presented.

It further appears from the opinion of the court that the court had in mind the fact that if, prior to this reservation to object to jurisdiction, an objection to jurisdiction had in fact been made, the reasons given by this court for the affirming of the judgment would not be sufficient, for we find in the opinion the following:

> "A motion was made to quash the service of summons. The motion is not found in the record, but from a memorandum opinion of the court below it appears that the ground of the motion was that the person who was served with the summons was not an agent upon whom service was authorized to be had."

In other words, the court has in effect said that if a motion to quash service of summons had been

made, and if, included in that motion, there was the objection to jurisdiction here presented, that then this court must consider the same. Our answer is that the objection to jurisdiction now presented was made, that is to say: it was contended for by plaintiff in error, and it was set out in the moving papers that service of summons was not authorized by the provisions of section 411, C. C. P.

It is unfortunate that in the transcript of the record the moving papers on the motion to quash service of summons do not appear. That the moving papers were sufficient, however, to permit of the present objection to jurisdiction, and that they were so considered by the court of original jurisdiction and by counsel for defendant in error, is evidenced by that part of the record wherein we find the court itself at the time of trial raising the question of whether or no it had jurisdiction (Tr. of record, pp. 31 and 32). In other words, and by reason of what was said and done at the time of trial, and in connection with the question of the court's lack of jurisdiction, this court is not, we respectfully submit, justified in assuming that the motion to quash service of summons was not sufficient in every way to raise the questions here presented. In short, this court should not make inference as to the contents or grounds of the motion to quash service of summons by what was said in a memorandum opinion by the judge of the court below at the time that the motion to quash was denied. Strictly speaking, and following our

state practice, the memorandum opinion in connection with the motion to quash service of summons has no place in the record at all. It is not part of the judgment roll and is not contained in the bill of exceptions. If the opinion of the court below on the motion to quash service of summons,—a document in the record without authority of law,—is to affect the ruling of this court on questions of jurisdiction here presented, then we respectfully submit that the moving papers out of which this memorandum opinion grew should also be considered by this court, and if so considered, it would be apparent that the plaintiff in error did not waive, and has not waived, its right to object to the jurisdiction of the district court upon the ground herein presented.

With all respect to this court it seems incredible that, upon a record that shows a question of jurisdiction raised in the court below by the judge thereof himself, and later presented in said court under the direct permission of said judge, this court should say that the same has been waived.

There is not involved here the question of whether or no plaintiff in error has waived the right to object to jurisdiction by interposing a pleading which combines with the objection to jurisdiction matters that go to the merits of the cause of action itself, as was the case in Western Loan & Savings Bank v. Butte & Boston Cons. Mg. Co., 210 U. S. 368, and in the further case of Fry v. Denver & R. G. R. Co., 226 Fed. 893, for here the first ap-

pearance—that to quash service of process, was special, "defendant above named appearing specially for this notice and not otherwise", the next appearance being that by way of answer wherein the objection to the jurisdiction was specifically reserved.

With the facts before it as they are presented here, we, with much earnestness urge upon this court that the questions of law presented by plaintiff in error should be ruled upon by this court. If it is the view of this court, as it was in the court below, that by its counterclaim plaintiff in error has assented to jurisdiction, we accept the ruling of the court for its judgment on matters of law is bigger, broader and superior to that of counsel herein. To refuse relief to petitioner in error for the reason stated in the opinion herein, is, we respectfully submit, a denial to it of a right given by law. The signers of this petition did not represent plaintiff in error in the court below. They did not begin their services until a few days before the oral argument had in this court. We have been advised, and therefore state, that the transcript of record upon writ of error was prepared as directed by the court itself. Certainly neither court nor counsel anticipated the affirming of the judgment for the reasons given by this court.

ERRORS ASSIGNED TO THE ADMISSION OF TESTIMONY.

We make further trespass upon the time of the court for it is apparent that this court, due, doubt-

less, to the way in which the brief on the merits is written, has not appreciated the point plaintiff in error is endeavoring to make. To illustrate: Objection is made to the allowing of the question asked the witness Oliver: "What value in your judgment was the confession of judgment to the Moore Filter Company if the Moore Filter Company had made reasonable use of it in its negotiations and dealings with other mining companies that were infringers of its patent?" In the opinion rendered it is said, after the asking of the question above:

> "The court interposed by explaining to the witness that what counsel was asking him was whether from his knowledge of the business he would consider that a second adjudication of the validity of the patent, where the patent had given rise to litigation growing out of infringements, would be of value to one owning the patent and making future settlements with parties who had infringed the patent."

With all respect to this court we say that the question answered was not preceded by the above explanation on the part of the trial court. What the trial court is accredited with appears at the bottom of page 46 of the record. The question asked and objected to appears on page 47. The lower court in allowing the question said:

> "What is, in counsel's mind, is that: The value of the procuring of this decree was more or less potential—you might say in a sense intangible—but would depend upon the use which was made of the fact that such a decree had been presented; the question really put to the witness involved this inquiry, what in

> his judgment, having a knowledge of the business of the Moore Filter Company—in fact, having an interest in the business growing out of his contractual relations with that company,—what would have been the value to the Moore Filter Company of this decree if further availed of by them for the purposes for which it was available."

Said witness Oliver did not qualify as a patent lawyer, and could not have so done. When the court permitted the answering of the question:

> "Would you consider that the procuring and entry of that judgment against the Golden Cycle Mining Company * * * would be of value to the Moore Filter Company in making settlements with various other infringers of the process of the Moore Filter Company in various parts of America and elsewhere?"

the court was going to the utmost limits; in fact, in our judgment this question itself should not have been answered by this witness. Stop for a minute and think of what knowledge the witness must have had to answer the question intelligently. He probably had no idea of the extent or character of the filters used by the Golden Cycle Mining Company. Whether upon other infringers "in various parts of America and elsewhere" the settlement by the Golden Cycle Company would be an indication of weakness or strength on the part of the Moore Company and the character and extent of their patents, was a question which, we submit, could not be answered by any individual. The question is broad enough to include the entire

world. Doubtless there were many infringers of the Moore process that never had heard and never will hear of the confession judgment obtained against the Golden Cycle Company. To permit this witness to say before the jury: "Yes, I believe it would be of very vital importance for this reason: that every one who has had experience in patent matters knows that an adjudication in one circuit means nothing more than the right to go and fight it out in some other circuit, because it is never final, whereas, if you get it in two circuits, the *chances* are very much better for a complete settlement of the case" could not but have improperly affected the jury. In other words, this witness, without knowledge, for no man could have knowledge of what is in the minds of those in "various parts of America and elsewhere", was permitted to impress upon the jury the fact that a very valuable act had been performed for plaintiff in error.

As above stated, we believe the court below went too far in permitting the answering of the question above. Note how the court—and we say it with all respect, was led on. After that question, which in essence is that the witness considered the obtaining of the judgment of great value, he is asked:

> "What value in your judgment was the confession judgment," etc.

With all respect to the judge of the court below, as to whom no one has a higher opinion as a man

and as a lawyer than the signers of this petition, we find that the question asked is permitted to be answered upon the theory, and upon the premise, that while "the procuring of this decree was more or less potential—you might say in a sense intangible", still the Moore Filter Company, if it availed of the same "for the purposes for which it was available", would receive value. The witness in answering the question was called upon to determine not only how far the decree was available, that is, its effect upon the users of mining filters in various parts of America and elsewhere, but also how far the Moore Filter Company could, would and should go in availing itself of the same.

This court has said:

> "We are not convinced that the objection should have been sustained or that it was reversible error to admit the testimony of a witness who to some extent was an expert and qualified to testify as to the timeliness of the services rendered by the defendant in error and the circumstance under which they were rendered."

We respectfully submit that the question asked of the witness did not touch upon the question of the timeliness of the service rendered, or the circumstances under which it was rendered. The question asked of the witness called forth his opinion as to the value of these services, the very question which the jury were called upon to decide, viz., the question of value. The authorities collected in the brief of plaintiff in error on the

merits illustrate that on this question of value, where the same is part of what the jury must determine, testimony is inadmissible, for it is taking away from the jury the very question that by law they must decide. While it is true that the question is unanswerable in itself, a correct answer being based upon facts beyond the ken of any one individual, the real vice of the question is as we have above stated,—that it takes from the jury the very facts that they are to determine, and so it matters not whether or no the witness "who to some extent was an expert", was qualified to testify or not. All the qualification in the world, and all knowledge in the world could not as a matter of law make the question proper.

Dated, San Francisco,
March 5, 1917.

Respectfully submitted,

J. R. PRINGLE,
C. A. SHUEY,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

J. R. PRINGLE,
Of Counsel for Plaintiff in Error and Petitioner.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 2843

Moore Filter Company (a corporation),
Plaintiff in Error,

vs.

J. L. Taugher,
Defendant in Error.

J. R. Pringle and Clarence A. Shuey, for the Plaintiff in Error.

John L. Taugher, Defendant in Error.

Before Gilbert, Morrow and Hunt, Circuit Judges.

Gilbert, Circuit Judge:

The defendant in error, a citizen of California, brought an action to recover the value of personal services alleged to have been rendered to the plaintiff in error, a corporation of the State of Maine. Service of the summons was had upon an agent of the plaintiff in error residing in San Francisco. From the allegations of the complaint, it was inferable that all the services therein mentioned were rendered elsewhere than in the State of California. A motion was made to quash the service of the summons. The motion is not found in the record,

but from a memorandum opinion of the court below, it appears that the ground of the motion was that the person who was served with the summons was not an agent upon whom service was authorized to be had. At the beginning of the answer to the complaint is the following: "Now comes the defendant, the Moore Filter Company, and without waiver of its objections that this Honorable Court has acquired and can lawfully exercise no jurisdiction over it or over the subject matter of this action, which said objections and the several benefits thereof, are specifically reserved to it, and also specifically reserving all of its rights under motion to quash service of summons in this action heretofore made by it and denied by this court, said defendant makes answer and says:" Then followed denials of certain of the allegations of the complaint, and in conclusion the plaintiff in error set up a counter claim for $7,500.00, which it was alleged arose out of the same transactions that were set forth in the complaint. There was no allegation in the answer that the services for which the defendant in error sought to recover were rendered without the State of California, or upon contracts made elsewhere than in that state, and nowhere in the pleadings did the plaintiff in error present such an objection to the jurisdiction. Upon the conclusion of the opening statement for the plaintiff in the action, the court on its own motion suggested its doubt of the jurisdiction, on the ground that the subject matter of the action grew out of a transaction which did not have

its origin in the state or in the district, and no part of which was performed in the state or district, but after argument of counsel, the court concluded, in view of the nature of the pleadings and the interposition of the counter claim, that the court had acquired jurisdiction, and so ruled. To that ruling the plaintiff in error reserved an exception, and again, at the conclusion of the plaintiff's case, moved to dismiss the action on the ground that the court could lawfully exercise no jurisdiction over the defendant in the action or the subject matter thereof.

The plaintiff in error now presents to this court the question of the jurisdiction, and it contends that it did not waive the question by pleading a counter claim, for the reason that under the statute of California and the decisions of the courts of that state, it was compelled to plead the counter claim or lose the right to assert the same in any subsequent action. We need not pause to consider whether a counter claim thus pleaded under compulsion would take the case out of the rule of Merchants Heat & L. Co. vs. Clow & Sons, 204 U. S. 286, in which case the defendant elected to sue upon a counter claim, although under the law of Illinois which controlled the question, there was no obligation to plead a cross demand, and whether he should do so or not was left to his choice, for, in our opinion, the plaintiff in error here waived all right to object to the jurisdiction on the ground now urged, by answering upon the merits and setting up the counter

claim and going to trial upon both without having presented by demurrer or answer that question of the jurisdiction to the court below.

Error is assigned to the admission of a portion of the testimony given by one Oliver, a mining engineer engaged in manufacturing and selling filters for cyanide processes used for the same purpose as the Moore filter, who had testified that in the year 1913 he had a general idea of the patent situation in the United States relating to filters in use in mining operations similar to the Moore process, and was familiar with the claims made by the Moore Filter Company under its patent filter process, and was familiar with the litigation between that company and the Tonopah Belmont Mining Company, and had studied the matter very thoroughly, because he was having trouble with the Moore Filter Company, which claimed that he was infringing their patents, that he had obtained patents for filter apparatus and had given a great deal of consideration to the filter situation, both in the United States and abroad, and that he knew of the settlement the plaintiff in error made with the Golden Cycle Mining Company, by which the latter confessed judgment for $50,000.00, which was announced in the technical journals. He was asked: "What value, in your judgment, was the confession of judgment to the Moore Filter Company if the Moore Filter Company had made reasonable use of it in its negotiations and dealings with other mining companies that were infringers of its

patents?" Objection was interposed on the ground that the witness was not competent to pass on the value of a judgment of confession, and on the further ground that the testimony was incompetent. The court interposed by explaining to the witness that what counsel was asking him was whether from his knowledge of the business he would consider that a second adjudication of the validity of the patent, where the patent had given rise to litigation growing out of the infringements, would be of value to one owning the patent and making future settlements with parties who had infringed the patent. The answer of the witness was: "It is a difficult matter to put in dollars and cents. It came at a psychological moment. The Moore Filter Company had won its suit against the Tonopah Belmont in another circuit; and this was the first settlement that was made, the first large settlement they had gotten from infringers. The Tonopah Belmont case was still in the courts awaiting a judgment—waiting for the accounting. They had won the case." We are not convinced that the objection should have been sustained, or that it was reversible error to admit this testimony of a witness who, to some extent, was an expert and was qualified to testify as to the timeliness of the services rendered by the defendant in error, and the circumstances under which they were rendered. That was the sum and substance of his answer to the question, and in the light of the meager portion of the evidence which the record contains, it does

not appear that such testimony was beyond the scope of legitimate inquiry.

We find no error. The judgment is affirmed.

(Endorsed): Opinion. Filed Feb. 5, 1917.
F. D. MONCKTON, Clerk.

No. 2845

United States
Circuit Court of Appeals
For the Ninth Circuit.

DANIEL CALLAHAN,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index.

Names and Addresses of Attorneys of Record.

R. F. ROTH, Attorney for Plaintiff and Defendant in Error,
Fairbanks, Alaska.

LEROY TOZIER, Attorney for Defendant and Plaintiff in Error,
Fairbanks, Alaska. [1*]

In the District Court for the Territory of Alaska, Fourth Division.

No. 713—CRIMINAL.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

DANIEL CALLAHAN,
Defendant.

Praecipe for Transcript of Record.

The clerk of the court will please prepare and certify a copy of the record in this action as follows:

1. The indictment.
2. The bill of exceptions complete.
3. All journal entries connected with the trial, including the final judgment.
4. All papers connected with the writ of error, except the writ of error, the citation, order or orders extending time in which to file transcript in the Appellate Court, and the stipulation, if any, in regard

*Page-number appearing at foot of page of original certified Transcript of Record.

to printing record. The last-mentioned papers, being entitled in said Appellate Court, are to be forwarded to and filed there.

LEROY TOZIER,
Attorney for Defendant.

Service and receipt of copy admitted this 6th day of May, 1916.

R. F. ROTH,
United States District Atty.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 6, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. **[2]**

[Caption and Title.]

Stipulation as to Printing Record.

It is stipulated between the attorneys for the parties respectively, that in printing the record in this case for use in said court, all captions should be omitted after the title of the cause has been printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also that after printing the indorsements and file-marks on the indictment, bill of exceptions, record in Appellate Court, the indorsements other than file-marks on all papers should be omitted, and the word "Indorsements" printed in lieu thereof.

All other parts of the record should be printed.

Dated May 6th, 1916.

LEROY TOZIER,
Attorney for Plaintiff in Error.
R. F. ROTH,
United States District Attorney, for Defendant in Error.

[Indorsed]: Filed May 6, 1916. [3]

[Caption and Title.]

Indictment.

DANIEL CALLAHAN is accused by the Grand Jury of the Territory of Alaska, Fourth Judicial Division, Territory of Alaska, for the regular February, 1916, term of the District Court, by this indictment of the crime of rape, committed as follows, to wit:

That the said Daniel Callahan on the twenty-fifth day of June, A. D. one thousand nine hundred and fifteen, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously, carnally know and abuse one Grace Carey, a female child, under the age of sixteen years, to wit, of the age of fourteen years, he, the said Daniel Callahan being then and there a male person over the age of twenty-one years; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Fairbanks, in the Division and Territory

aforesaid, this 19th day of February, 1916.

R. F. ROTH,
United States Attorney.

A True Bill.

J. P. NORRIS,
Foreman of the Grand Jury.

The following are the names of the witnesses examined before the Grand Jury on the finding of the foregoing indictment: Marion Carey; Grace Carey; Joe Mock; Laura Herington; J. H. Miller.

[Endorsed]: No. 713—Cr. In the District Court, Ter. of Alaska, Fourth Division. United States of America vs. Daniel Callahan. Indictment for the Crime of Rape. A True Bill. J. P. Norris, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open court in the presence of the Grand Jury and filed in the District Court, Territory of Alaska, Fourth Division, Fairbanks, Alaska, Feby. 19, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. Secret, Without Bail. Charles E. Bunnell, District Judge. **[4]**

[Caption and Title.]

Order for Bench Warrant.

The United States Grand Jury having, on this 19th day of February, 1916, returned an indictment against the defendant named therein for the crime charged in said indictment, now, on application of the United States Attorney, R. F. Roth, made in open court,—

It is ordered that the clerk of this court may issue a bench warrant directed to the United States Marshal for the defendant named in said indictment, said defendant not to be admitted to bail.

CHARLES E. BUNNELL,
District Judge. **[5]**

[Caption and Title.]

Order Entering Attorney of Record.

Now, at this time, came R. F. Roth, United States Attorney for and in behalf of the Government; came also the defendant herein, in the custody of the United States Marshal, and upon request of defendant,—

IT IS HEREBY ORDERED that Leroy Tozier, Esq., be, and he hereby is, entered as attorney of record for defendant herein.

CHARLES E. BUNNELL,
District Judge. **[6]**

[Caption and Title.]

Arraignment.

Now at this time came R. F. Roth, United States Attorney, and Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, for and in behalf of the Government; came also the defendant herein, in custody of the United States Marshal and with his attorney Leroy Tozier; the defendant was brought before the bar of the court and being asked if he is indicted by his true name and answering that he is, the said indictment was read to the defendant

by the clerk of the court, and a copy of said indictment delivered to him; the defendant asked time in which to plead, or otherwise move against the indictment, the time therefor was fixed at 2 o'clock P. M., Wednesday, February 23d, 1916.

CHARLES E. BUNNELL,
District Judge. [7]

[Caption and Title.]

Order Granting Permission to File Motion to Set Aside Indictment and Continuing Time to Plead.

2:00 P. M.

Now, at this time, came Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys; came also the defendant herein, in person, in the custody of the United States Marshal; with his attorney Leroy Tozier, Esq., and this being the time heretofore set for defendant to enter his plea herein, counsel for defendant now requests permission to file a motion to set aside the indictment and there being no objections, the Court took the matter under advisement and the time for defendant to enter his plea herein was continued to 10 o'clock A. M., Thursday, February 24th, 1916.

CHARLES E. BUNNELL,
District Judge. [8]

[Caption and Title.]

Order Granting Permission to File Motion to Set Aside Indictment.

Now, at this time, came R. F. Roth, United States Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, for and in behalf of the Government; came also the defendant herein, in the custody of the United States Marshal and with his attorney Leroy Tozier, Esq., and counsel for defendant having, on a prior day of this term, asked permission of the Court to file a motion to set aside the indictment herein, and the Court having considered the request of defendant's counsel.

IT IS ORDERED that said motion of defendant may be filed.

CHARLES E. BUNNELL,
District Judge. [9]

[Caption and Title.]

Motion to Set Aside Indictment.

Comes now the defendant above named and moves the Court to set aside the indictment herein, and for grounds of said motion alleges:

I.

That the Grand Jury which found and presented the alleged indictment herein did not have authority to inquire into crimes or present indictments because the said grand jury was not selected and summoned according to law nor were their proceedings conducted in the manner prescribed by the laws of the

United States or any laws applicable to the Territory of Alaska, and in particular, Chapter Four, of Title XV, Code of Criminal Procedure, Compiled Laws of Alaska.

II.

That the said indictment was not found, indorsed and presented as prescribed in Chapter Six of Title XV, Code of Criminal Procedure, Compiled Laws of Alaska, or any laws applicable to the said Territory of Alaska.

Dated February 23, 1916.

LEROY TOZIER,
Attorney for Defendant.

Service admitted February 23, 1916.

HARRY E. PRATT,
Asst. U. S. District Attorney.

[Endorsed]: Filed Feb. 24, 1916. [10]

[Caption and Title.]

Order Denying Motion to Set Aside Indictment.

Now, at this time, came R. F. Roth, United States Attorney; Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, for and in behalf of the Government; came also the defendant herein, in the custody of the United States Marshal and with his attorney, Leroy Tozier, Esq., and defendant having filed a motion to set aside the indictment herein, the respective counsel herein submit said motion to the Court without argument, and the defendant and defendant's counsel both being present and not having produced or offered to produce to the Court any

evidence in support of said motion, and the Court having considered said motion.

IT IS ORDERED that the same be, and it is, hereby denied.

(CLERK'S NOTE: Defendant notes an exception to the ruling of the Court, which exception is allowed.)

CHARLES E. BUNNELL,
District Judge. **[11]**

[Caption and Title.]

Demurrer to Indictment.

Comes now, the defendant above named and demurs to the indictment herein, and for grounds of demurrer alleges:

I.

That it does not substantially conform to the requirements of Chapter Seven of Title XV, Code of Criminal Procedure, Compiled Laws of Alaska, in that it is not direct and certain.

II.

That the facts stated in said indictment do not constitute a crime.

Dated February 23, 1916.

LEROY TOZIER,
Attorney for Defendant.

Service admitted February 23, 1916.

R. F. ROTH,
U. S. District Attorney.

[Endorsed]: Filed Feb. 24, 1916. **[12]**

[Caption and Title.]

Hearing on Demurrer to Indictment.

Now, at this time came R. F. Roth, United States Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, for and in behalf of the Government; came also the defendant herein, in the custody of the United States Marshal and with his attorney, Leroy Tozier, Esq., and this being the time set to plead or otherwise move against said indictment, counsel for defendant herein now files his demurrer to the indictment herein, which was submitted without argument, and the matter taken under advisement by the Court.

CHARLES E. BUNNELL,
District Judge. **[13]**

[Caption and Title.]

Order Overruling Demurrer to Indictment.

Now, at this time, came R. F. Roth, United States Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys; came also the defendant herein, in the custody of the United States Marshal and with his attorney, Leroy Tozier, Esq., and counsel for defendant herein, having on a prior day of this term filed a demurrer to the indictment herein, and the Court being fully advised in the premises.

IT IS ORDERED that the said demurrer be, and the same is, hereby overruled.

CHARLES E. BUNNELL,
District Judge. **[14]**

[Caption and Title.]

Plea of Not Guilty.

Now at this time came R. F. Roth, United States Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, came also the defendant herein, in the custody of the United States Marshal, and with his attorney, Leroy Tozier, Esq., and defendant having, on a prior day of this term, been duly arraigned, was asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, namely, that of rape, to which defendant says that he is not guilty and therefore puts himself upon the country, and the United States Attorney for and in behalf of the Government, doth the same, whereupon, the Court ordered that the plea of defendant be entered accordingly.

CHARLES E. BUNNELL,
District Judge. **[15]**

[Caption and Title.]

Order Setting Cause for Trial.

Now, at this time, came R. F. Roth, United States Attorney, Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys; came also the defendant herein, in the custody of the United States Marshal, with his attorney, Leroy Tozier, Esq., and,

IT IS ORDERED that the trial of this cause be, and the same is, hereby set for 10 o'clock A. M., Fri-

day, March 3d, 1916, to follow the trial of Cause No. 709–Cr.

CHARLES E. BUNNELL,
District Judge. **[16]**

[Caption and Title.]

Minutes of Court—March 22, 1916—Trial.

Now, at this time, this cause came on regularly for trial by jury, the defendant appearing in person and with his attorney, Leroy Tozier, Esq., and in the custody of the United States Marshal; came also R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government, and both sides announcing their readiness for trial, the following proceedings were had, to wit:

On the Court's own motion, the Court ordered that all persons of the general public, not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling counsel for defendant notes an exception, which exception was allowed.

The clerk proceeded to draw from the trial jury box, one at a time, the names of the regular panel of Petit Jurors and, after said jurors were duly sworn as to their qualifications, the United States Attorney and counsel for defendant proceeded to duly examine said jurors, and exercise their challenges according to law.

Members of the regular panel of Petit Jurors excused for cause or peremptorily were excused until

10 o'clock A. M., Saturday, March 25th, 1916.

The hour for noon recess having arrived, and it appearing to the Court that the jury in said cause be kept together in charge of sworn bailiffs, S. T. Kincaid and R. K. Latimer were, in open court, **[17]** duly sworn as bailiffs in charge of said jury during the trial of said cause, whereupon, after being admonished by the Court, the said jury were excused, in charge of their sworn bailiffs,

Members of the regular panel of Petit Jurors not yet drawn, were also excused until 2 o'clock P. M.

CHARLES E. BUNNELL,
District Judge. **[18]**

[Caption and Title.]

Order to Supply Jurymen and Bailiffs With Meals and Lodgings.

Now, on this day, to wit, March 22d, 1916, it appearing to the Court that it is necessary that the jury now in process of formation or having under consideration the law and the evidence as given to them on the trial of the above-mentioned cause, should be kept together and free from communication or association with other persons and in constant charge of two officers of the Court, duly sworn;

IT IS NOW THEREFORE ORDERED that the said jury be assigned to the custody of two duly sworn bailiffs and that the U. S. Marshal for said Division and Territory provide the said jury and bailiffs with meals and lodgings at the expense of the United States until such time as the jurymen

have agreed upon their verdict or have been discharged by the Court.

CHARLES E. BUNNELL,
District Judge. **[19]**

[Caption and Title.]

Trial by Jury Continued.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal, with his attorney Leroy Tozier, Esq., came also the jury in the box, in charge of their sworn bailiffs and the remaining members of the regular panel of petit jurors excepting those previously excused for cause in this case, and being called and all answering to their names as present, said trial was resumed and the following proceedings had, to wit:

Respective counsel continued to examine the jurors drawn and exercised their challenges according to law.

At 3:40 o'clock P. M. the jurors in the box, having been admonished by the Court, were excused in charge of their sworn bailiffs and Court declared recess until 3:55 P. M.

3:55 P. M.

Thereafter, at 3:55 P. M., came the defendant, in the custody of the United States Marshal; came the jurors heretofore excused in charge of their sworn

bailiffs, and the respective parties and attorneys as heretofore, whereupon said trial was resumed and the following proceedings had, to wit:

Respective counsel continued to examine the jurors drawn and exercise their challenges according to law, and it appearing to the **[20]** Court that the regular panel of petit jurors is exhausted and that the jury is incomplete, it is hereby ordered that the clerk of this court issue a writ of special venire directed to the United States Marshal of this Division and Territory, commanding him to summon from the body of the District, eight (8) men qualified to sit as jurors in this Court, said special venire returnable at 10 o'clock A. M. Thursday, March 23d, 1916.

Hereupon, the jurors in the box, having been duly admonished by the Court, were excused in charge of their sworn bailiffs, until 10 o'clock A. M., Thursday, March 23d, 1916.

CHARLES E. BUNNELL,
District Judge. **[21]**

[Caption and Title.]

Minutes of Court—March 23, 1916—Trial.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney, came also the defendant in the custody of the United States Marshal, with his attorney Leroy Tozier; came also the members of the regular panel of petit jurors, except those previously excused for cause, the jurors in the box being in charge

of their sworn bailiffs and all of said jurors having been called and answered to their names as present, the following proceedings were had, to wit:

The United States Marshal returned into court the special venire heretofore issued and the members thereof, to wit: N. A. Shaw; Axel F. Carlsten; W. W. Sherrard; T. A. Parsons; R. S. Steele; J. H. Patton; Thos. Nerland; and Wallace Cathcart upon being called and answering to their names, the clerk proceeded to draw from the trial jury-box, one at a time, the names of the members of said special venire and the respective attorneys proceeded with the examination of said persons so drawn until each side was satisfied with the jury and the jury was complete and consisted of the following persons, to wit:

L. J. Heacock;	George Knapp;
E. H. Boyer;	John Solen;
H. U. Woodin;	R. J. Patterson;
Perry Willoughby;	R. S. Steele;
J. H. Patten;	Wallace Cathcart;
Chas. McDermott;	Ezra Buffington;

which said jury was duly sworn to try the issues in said cause.

Hereupon the jury having been duly admonished by the Court, were excused in charge of their sworn bailiffs.

CHARLES E. BUNNELL,
District Judge. **[22]**

[Caption and Title.]

Minutes of Court—March 23, 1916—Trial.

2:00 P. M.

Now, at this time, came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant, in the custody of the United States Marshal, with his attorney Leroy Tozier, Esq., came also the jury heretofore sworn, in charge of their sworn bailiffs and being called and each answering to his name, the said trial was resumed and the following proceedings had, to wit:

Opening statement was made by R. F. Roth, United States Attorney, in behalf of the Government, counsel for defendant waiving statement.

Grace Carey, Laura Herington, Joe Mock, Marion Carey and J. J. Buckley were each duly sworn and testified in behalf of the Government.

Government rests.

Hereupon, the jury having been duly admonished, were excused in charge of their sworn bailiffs until 3:30 o'clock P. M.

3:30 P. M.

Thereafter, at 3:30 o'clock P. M. came the jury in the charge of their sworn bailiffs; came the defendant in the custody of the United States Marshal and the respective parties and attorneys as heretofore, and the jury having been stipulated present, said trial was resumed and the following proceedings had, to wit: **[23]**

Grace Carey was recalled and testified for the Government on cross-examination.

Govt. rests. Hereupon, the jury having been duly admonished were excused, in charge of their sworn bailiffs, until 10 o'clock A. M., Friday, March 24th, 1916.

CHARLES E. BUNNELL,
District Judge. **[24]**

[Caption and Title.]

Minutes of Court—March 24, 1916—Trial.

Now, at this time, came R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal with his attorney, Leroy Tozier, Esq., came also the jury heretofore sworn, in charge of their sworn bailiffs, whereupon said trial was resumed and the following proceedings had, to wit:

The jury were excused in charge of their sworn bailiffs, whereupon defendant made a motion that certain testimony of Laura Herington's be stricken from the record, which motion was denied by the Court.

Defendant moves the Court for an instructed verdict of not guilty which motion was denied.

Hereupon the jury returned into court, in charge of their sworn bailiffs, and it was stipulated by respective counsel that all were present.

Daniel Callahan was duly sworn and testified in his own behalf.

Mrs. Daniel Callahan and Dick Callahan were each duly sworn and testified in behalf of defendant.

Hereupon, the jury having been duly admonished, were excused in charge of their sworn bailiffs, and Court declared recess until 11:15 o'clock A. M. **[25]**

11:15 A. M.

Thereafter, at 11:15 o'clock A. M. came the defendant, in the custody of the United States Marshal; came the jury in charge of their sworn bailiffs and the respective parties and attorneys as heretofore, and it having been stipulated by respective counsel that said jury were all present, said trial was resumed:

H. J. McCallum was duly sworn and testified in behalf of defendant.

Defendant rests.

Grace Carey and Laura Herington were each recalled and testified for the Government in rebuttal.

The jury having been duly admonished, were excused in charge of their sworn bailiffs, until 2 o'clock P. M.

CHARLES E. BUNNELL,
District Judge. **[26]**

[Caption and Title.]

Minutes of Court—March 24, 1916—Trial.

2:00 P. M.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came also the defendant in the custody of the United

States Marshal with his attorney Leroy Tozier, Esq., came likewise the jury in charge of their sworn bailiffs, and being called and each answering to his name as present, said trial was resumed and the following proceedings had, to wit:

The jury having been duly admonished by the Court, were excused in charge of their sworn bailiffs until 2:15 o'clock P. M.

2:15 P. M.

Thereafter, at 2:15 o'clock P. M. came the jury in charge of their sworn bailiffs and it was stipulated by respective attorneys that all were present; came also the defendant in the custody of the United States Marshal and the respective attorneys and parties as heretofore, whereupon said trial was resumed and the following proceedings had, to wit:

Defendant rests.

Opening argument was made by R. F. Roth, United States Attorney in behalf of the Government, followed by argument by Leroy Tozier, Esq., in behalf of defendant. [27]

At 4:13 o'clock P. M., the jury having been duly admonished Court declared recess until 4:25 o'clock P. M., and said jurors retired in charge of their sworn bailiffs.

4:25 P. M.

Thereafter, at 4:25 P. M., came the jury in charge of their sworn bailiffs and it was stipulated by respective counsel that all were present; came also the defendant in the custody of the United States Marshal and the respective attorneys and parties as here-

tofore; and the following proceedings were had, to wit:

Argument was continued by counsel for defendant, Leroy Tozier, Esq.

At 4:50 o'clock P. M. the jury having been duly admonished were excused, in charge of their sworn bailiffs, until 7:30 o'clock P. M.

7:30 P. M.

Thereafter, at 7:30 o'clock P. M. came the jury in charge of their sworn bailiffs; and being called, each answered to his name as present; came also the defendant in the custody of the United States Marshal; came likewise the respective attorneys and parties as heretofore and the following proceedings were had, to wit:

Closing argument was made by R. F. Roth, United States Attorney.

Thereafter the Court duly instructed the jury as to the law in the premises, whereupon R. K. Latimer and S. T. Kincaid were each duly sworn as bailiffs in charge of said jury.

At 9:02 P. M. the jury retired in charge of their sworn bailiffs to deliberate upon their verdict.

CHARLES E. BUNNELL,
District Judge. [28]

[Caption and Title.]

Minutes of Court—March 25, 1916—Trial.

Now, at this time, came R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney, in behalf of the Government; came

also the defendant in the custody of the United States Marshal with his attorney, Leroy Tozier, Esq., came likewise the jury heretofore sworn to try the issues in said cause, in charge of their sworn bailiffs, and being called and each answering to his name, the following proceedings were had, to wit:

The said jury, by and through their foreman, stated to the Court, in open court, that the jury is as yet unable to agree. The Court directed that the jury retire for further deliberation, whereupon said jury retired in charge of their sworn bailiffs.

CHARLES E. BUNNELL,
District Judge. **[29]**

[Caption and Title.]

Minutes of Court—March 25, 1916—Trial.

5:42 P. M.

Now, at this time, came R. F. Roth, United States Attorney; came also the defendant, in the custody of the United States Marshal with his attorney, Leroy Tozier; came likewise the jury heretofore sworn to try the issues in the above-entitled cause, in charge of their sworn bailiffs, and being called and each answering to his name as present, said jury did present, by and through their foreman, in open Court, their verdict in said cause which is in words and figures as follows, to wit.

"In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 713—CR.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL CALLAHAN,

Defendant.

VERDICT.

We, the jury, in the above-entitled action, duly impaneled and sworn, find the defendant Daniel Callahan guilty of the crime of rape, as charged in the indictment.

Dated: Fairbanks, Alaska, March 3/25, 1916.

L. J. HEACOCK,

Foreman."

—which said verdict was filed with the Clerk of the Court in open Court and defendant remanded to the custody of the United States Marshal to await sentence; the jury in this cause were excused from further deliberation and members of the special venire ordered discharged.

CHARLES E. BUNNELL,

District Judge. **[30]**

[Caption and Title.]

Verdict.

We, the jury in the above-entitled action, duly impaneled and sworn, find the defendant Daniel Calla-

han guilty of the crime of rape as charged in the indictment.

Dated: Fairbanks, Alaska, March 3/25, 1916.

L. J. HEACOCK,
Foreman.

Entered in Court Journal No. 13, page 473.

[Endorsed]: Filed Mar. 25, 1916. **[31]**

[Caption and Title.]

Motion for a New Trial.

Comes now the defendant in the above-entitled action and moves the Court to set aside the verdict of "Guilty" rendered herein against the defendant, upon the 25th day of March, 1916, and grant a new trial herein for the following reasons:

I.

Misconduct of the United States Attorney in his address to the jury in this case by using the following language:

> "You noticed that I challenged the statement of Mr. Tozier that Grace Carey testified that the last time that she was at the Callahan house was on the 25th day of June. I made that challenge of those statements, because my understanding was that she testified that that was the last time she had sexual intercourse with Dan Callahan, and I have not any doubt at all but that is what was intended, because there is no doubt but what Grace Carey had been to Callahan's house many times since. That is an immaterial matter. There is no doubt but what she had been

there many times since. And if I had understood that statement, why, of course, I would have had that corrected by testimony, because, if she had been there later—"

For the reason that the language of the prosecuting attorney above quoted, is improper in any criminal case; not based upon any evidence or reasonably deducible therefrom, and is calculated to inflame and prejudice the minds of the jury, and by reason of said language upon the part of the said prosecuting Attorney, the defendant was prevented from having a fair trial.

II.

Error of the Court at the trial and excepted to by the defendant in the admission of evidence, to wit:

For the error of the Court in overruling the objection of the defendant to the admission of the testimony of Laura Herington, for the reason that the same was incompetent, immaterial and wholly [32] inadmissible for any purpose or upon any correct theory applicable to this case, and was purely hearsay, and not binding upon this defendant; and to which overruling of the defendant's objection the defendant duly excepted.

III.

For error of the Court in overruling defendant's objection to the admission of the testimony of the witness Laura Herington as to a conversation between the witness Grace Carey and the witness Laura Herington, and particularly statements made by said Grace Carey to said Laura Herington immediately after the alleged commission of the alleged

offense, regarding where she, said Grace Carey, had been and certain money, to wit, the sum of three dollars she then had, and as to when and how she obtained the same; because said conversation and said statements were hearsay and not binding upon this defendant; to the admission of which testimony the defendant objected; which objection was overruled, to which the defendant duly excepted, as will more fully appear by the official stenographer's notes and record of the testimony of the said Laura Herington.

IV.

For the error of the Court in his ruling upon the motion of defendant to strike out all the testimony of the witness Laura Herington in this case; which motion was duly made by the defendant and overruled by the Court, and to which ruling the defendant then and there excepted.

V.

For the error of the Court in refusing to read and give the jury instructions Nos. One and Two, prepared and requested by the defendant, to be given by the Court in its charge to the jury, to which refusal the defendant duly excepted; which exceptions were allowed by the Court. [33]

VI.

For error of the Court in giving and reading to the jury instructions Nos. 20, 23, 24, and 25 of the Court's charge to the jury, for the reasons set out in defendant's exceptions to said instructions, which exceptions to said instructions were allowed by the Court.

VII.

Insufficiency of the evidence to justify the verdict of guilty, and because said verdict is against the law.

VIII.

For the reason that because of said errors of law occurring at the trial and excepted to by the defendant, and which more fully appears in the shorthand notes taken at the trial, the defendant herein was prevented from having a fair and impartial trial.

LEROY TOZIER,
Attorney for Defendant.

Service of the foregoing motion for a new trial admitted and a true copy thereof received this 27th day of March, 1916.

R. F. ROTH,
U. S. Attorney.

[Endorsed]: Filed Mar. 27, 1916. [34]

[Caption and Title.]

Motion in Arrest of Judgment.

Comes now the defendant above named, and moves the Court for an order that no judgment be rendered against the defendant herein upon the verdict of guilty returned by the jury against him upon the 25th day of March, 1916, notwithstanding said verdict, upon the ground and for the reason that the indictment herein does not state facts sufficient to constitute a crime, as is more fully and particularly set forth in the demurrer to said indictment filed

herein, to which reference is hereby made and made a part of this motion.

LEROY TOZIER,
Attorney for Defendant.

Service of the foregoing motion admitted and a true copy thereof received this 27th day of March, 1916.

R. F. ROTH,
U. S. Attorney.

[Endorsed]: Filed Mar. 27, 1916. **[35]**

[Caption and Title.]

Order Setting Motion for New Trial for Hearing.

Now, at this time, came R. F. Roth, United States Attorney, in behalf of the Government; came also the defendant in the custody of the United States Marshal and with his attorney Leroy Tozier, and defendant's motion for a new trial in this cause is hereby set for 7:30 o'clock P. M. Monday, April 3d, 1916.

CHARLES E. BUNNELL,
District Judge. **[36]**

[Caption and Title.]

Hearing on Motion for New Trial and Arrest of Judgment.

7:30 P. M.

Now, at this time, came R. F. Roth, United States Attorney, in behalf of the Government; came also the defendant herein, in the custody of the United

States Marshal, with his attorney Leroy Tozier, Esq., defendant's motion for a new trial and arrest of judgment in this cause coming on regularly for hearing before the Court and after argument by respective counsel herein, the matter was taken under advisement by the Court.

CHARLES E. BUNNELL,
District Judge. **[37]**

[Caption and Title.]

Order Denying Motion for New Trial and Fixing Time for Sentence.

Now, at this time, came R. F. Roth, United States Attorney and Harry E. Pratt and Reed W. Heilig, Assistant United States Attorneys, in behalf of the Government; came also the defendant, in the custody of the United States Marshal, with his attorney Leroy Tozier, Esq., and defendant's motion for a new trial herein having previously been argued before the Court and submitted, and the Court now having considered said motion and being fully advised in the premises.

It is ordered that said motion for a new trial in this cause be, and the same is, hereby denied, to which ruling defendant notes an exception, which exception is allowed;

And, it is hereby ordered that the time for pronouncing sentence on the defendant herein be, and the same hereby is, fixed at 10 o'clock A. M., Tuesday, April 11th, 1916.

CHARLES E. BUNNELL,
District Judge. **[38]**

[Caption and Title.]

Sentence Pronounced.

Now, at this time, this being the time heretofore fixed for the pronouncing of judgment and sentence upon the defendant herein, the defendant appearing in the custody of the United States Marshal, with his attorney, Leroy Tozier, Esq., and plaintiff being represented by R. F. Roth, United States Attorney, and Reed W. Heilig, Assistant United States Attorney; defendant was asked by the Court if he had anything to say why judgment and sentence should not be pronounced upon him, and having spoken in his own behalf, and the United States Attorney having addressed the Court upon the subject,

The Court thereupon pronounced judgment and sentence upon the defendant ordering and decreeing that the defendant, Daniel Callahan, be confined in the United States penitentiary at McNeil's Island, State of Washington, for a period of twelve (12) years.

Whereupon the defendant was remanded to the custody of the United States Marshal, for the execution of this sentence.

CHARLES E. BUNNELL,
District Judge. **[39]**

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 713—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL CALLAHAN,

Defendant.

Judgment.

Now, at this time, to wit, April 11th, one thousand nine hundred and sixteen, the same being one of the regular February, 1916, term days of this court, this cause came on regularly in open session, for the pronouncement of judgment and sentence of this Court upon the defendant, Daniel Callahan. The defendant appeared in person and by his attorney, Leroy Tozier, and the United States appeared by R. F. Roth, United States Attorney and Reed W. Heilig, Assistant United States Attorney.

It appears to the Court, and the Court so finds, that the defendant Daniel Callahan, was, by a lawful and regular grand jury for the aforesaid division, duly and regularly indicted upon the 19th day of February, 1916, and charged therein of the crime of rape alleged to have been committed upon the 25th day of June, 1915, at Fairbanks, Alaska, Fairbanks Precinct, Alaska, upon Grace Carey, a female child under the age of sixteen years, and the defendant being over the age of twenty-one years.

It further appears to the Court that the defend-

ant was duly and regularly arraigned upon said indictment and plead not guilty thereto; that upon the 22d, 23d and 24th days of March, 1916, the same having been theretofore regularly appointed as the time of trial in this case; a jury of twelve men was duly and regularly impaneled and sworn, evidence introduced on behalf of plaintiff and defendant, arguments of counsel had and the jury instructed by the Court as to the law of the case; That said jury **[40]** upon said 24th day of March, 1916, retired to consider its verdict and upon the 25th day of March, 1916, returned the same into court, which was in words and figures, as follows:

"*In the District Court for the Territory of Alaska, Fourth Judicial Division.*

No. 713—CR.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL CALLAHAN,

Defendant.

VERDICT.

We, the jury in the above-entitled action, duly impaneled and sworn, find the defendant, Daniel Callahan, guilty of the crime of rape, as charged in the indictment.

Dated Fairbanks, Alaska, March 3/25, 1916.

L. J. HEACOCK,

Foreman."

That thereafter, defendant's motions in arrest of judgment and for a new trial, were duly and regu-

larly overruled and now, upon this 11th day of April, 1916, the same having been heretofore regularly designated as the time for the pronouncement of the judgment and sentence of the Court and the defendant having been asked if he had anything to say why judgment should not be pronounced upon him, and having made a statement in his own behalf, and the Court being fully advised in the premises,

IT IS ADJUDGED that the defendant, Daniel Callahan, is guilty of the crime of rape as charged in said indictment and in accordance with the aforesaid verdict, and it is the judgment and sentence of the Court that the defendant, Daniel Callahan, shall be imprisoned in the United States penitentiary, at McNeil's Island, County of Pierce, State of Washington, for a period of twelve years, and the United States Marshal is ordered to deliver said defendant to said penitentiary, for the execution of this sentence.

Dated at Fairbanks, Alaska, this 11th day of April, 1916.

CHARLES E. BUNNELL,
District Judge. **[41]**

Entered in Court Journal No. 13, page 506. **[42]**

[Caption and Title.]

Motion for Order Allowing Supersedeas and Fixing Amount of Bond.

The defendant moves the Court for an order allowing a supersedeas in this case and fixing the amount of the bond, and providing that such bond,

when given and approved by the judge of said court, shall operate as a supersedeas and stay the further execution of the judgment and sentence herein.

The records and files in the case will be used at the hearing of this motion.

LEROY TOZIER,
Attorney for Defendant.

Service of the foregoing motion admitted and receipt of copy acknowledged this 1st day of May, 1916.

R. F. ROTH,
United States Attorney.

[Endorsed]: Filed May 1, 1916; May 6, 1916. **[43]**

[Caption and Title.]

Order Extending Time for Filing Petition for Writ of Error.

Now, at this time, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government and Leroy Tozier, appearing in behalf of the defendant and counsel for defendant having filed his proposed bill of exceptions herein, now moves the Court for an order extending the time within which to file petition for writ of error, assignment of errors and citation on appeal in this cause, and there being no objection.

It is ordered that the time within which to file petition for writ of error, assignment of errors and citation on appeal in this cause be, and the same is,

hereby extended to 2 o'clock P. M., Saturday, May 6th, 1916.

CHARLES E. BUNNELL,
District Judge. **[44]**

[Caption and Title.]

Bill of Exceptions.

This case came on regularly for trial in above-entitled court on Wednesday, March 22, 1916, at 10 o'clock A. M., Honorable Charles E. Bunnell, Judge presiding. The defendant and his attorney, Leroy Tozier Esq., and United States District Attorney R. F. Roth and Assistant United States Attorney Reed W. Heilig, are present. The attorneys for respective parties announce that they are ready for trial. The Court orders all persons who do not have business before the Court to be excluded from the courtroom during the trial, but allows litigants, witnesses, jurors, attorneys, officers of the court, and representatives of the newspapers to be present. Defendant, by his attorney, Leroy Tozier, excepts to the order of the Court and requests the Court to change the order and allow an open trial, which motion is denied by the Court, and an exception allowed.

Proceedings are taken to impanel a jury, and at 2 P. M. the Court takes a recess until 2 P. M., and under the order of the Court two bailiffs are sworn to take charge of the jurors in the box, and they are placed in charge of said bailiffs and admonished to not talk about the case, etc.

At 2 P. M. Court reconvenes and proceedings are resumed to impanel the jury, and the regular panel of petit jurors having [45] become exhausted, the Court orders a special venire to issue to the United States Marshal to summon from the body of the district eight special veniremen whom he believes to be qualified to serve as jurors, returnable to-morrow morning at 10 A. M. and orders the jurors in the box to be kept together in charge of the bailiffs, admonishes the said jurors in the usual way, and continues the trial until 10 A. M. to-morrow.

Court convenes at 10 A. M. March 23, 1916, when the defendant and his attorney, and the district attorney and his said assistant, and the jurors in the box, are present. The special venire is returned, whereupon proceedings are resumed to impanel a jury, and the jury is completed and sworn to try the case, and the Court takes a recess until 2 P. M. and the jury withdraw in charge of the bailiffs.

Court reconvenes at 2 P. M., when the defendant and his attorney and the United States attorney and his assistant, and the jury, are present in court. Whereupon the following proceedings were had:

Mr. TOZIER.—I would like permission to further examine juror Patton—a few questions is all.

Mr. ROTH.—We object, because he has already been sworn to try the case.

Mr. TOZIER.—It is a matter that came to my knowledge since 12 o'clock—since the recess.

Mr. ROTH.—The other jurors have been excused and it is a little late.

The COURT.—A juror may be examined any time

(Testimony of Grace Carey.)

as to his general qualifications. If you desire to examine him in the matter of his citizenship, or something of that kind— **[46]**

Mr. TOZIER.—That is not it, your Honor. That is not the matter I want to examine him about.

Mr. ROTH.—We object to it now, because the rest of the venire is excused and the jury is sworn to try the case.

(Objection sustained. Defendant excepts and is allowed an exception.)

Mr. Roth makes an opening statement of the case on behalf of the plaintiff, and the defendant by his attorney waives an opening statement, whereupon the following proceedings were had and testimony was taken. **[47]**

Testimony of Grace Carey, for Plaintiff.

GRACE CAREY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Grace Carey.

Q. How old are you, Grace? A. Fifteen.

(Defendant, by his attorney, objects to any testimony being offered in this case for the reason that the indictment herein does not state facts sufficient to constitute a crime; and for the further reason that the Grand Jury which found and presented the alleged indictment herein did not have authority to inquire into crimes or present indictments, because the said Grand Jury was not selected or summoned according to law, nor were their proceedings conducted

(Testimony of Grace Carey.)

in the manner prescribed by the laws of the United States or any laws applicable to the Territory of Alaska, and in particular Chapter 4, Title 15, Code of Civil Procedure, Compiled Laws of Alaska; and for the further reason that the said indictment was not found, indorsed and presented as prescribed in Chapter 6, Title 15, Code of Criminal Procedure, Compiled Laws of Alaska, or any laws applicable to the said Territory of Alaska. Which objection is overruled, and defendant asks and is given an exception.)

Q. When is your birthday? A. 23d of March.

Q. Is this your birthday? A. Yes, sir.

Q. How old are you to-day?

A. Fifteen years old.

Q. Are you acquainted with Daniel Callahan, the defendant? A. Yes, I am.

Q. Do you know where you were born, Grace?

A. Circle City, Alaska.

Q. Are you acquainted with a man by the name of Joe Mock? A. Yes, sir. [48]

Q. Just tell this jury if you went to the residence of the defendant Daniel Callahan at any time last year, last summer. A. Yes. I did.

Q. When was the last time you went there?

A. About the latter part of June. Around there somewhere.

Q. Do you remember the children's celebration here, the Midnight Sun Celebration? A. Yes.

Q. When they had a carnival here?

A. Yes. I do.

(Testimony of Grace Carey.)

Q. Was it before or after that time?

A. It was after that time.

Q. How long after it?

A. I don't know. Just a few days.

Q. Where had you been just before you went to Callahan's residence that day?

A. To the postoffice.

Q. When you left the postoffice, where did you start to go? A. I started over to Callahan's.

Q. Did you go to Callahan's right away?

A. No.

Q. Why?

A. Because Joe Mock was in the next yard and I didn't want him to see me go in.

Q. Did you get anything from Joe Mock at that time?

A. Yes. He gave me some pansies.

Q. After he gave you the pansies, where did you go? A. I went home.

Q. After you got home, then where did you go?

[49] A. I went back over to Callahan's.

Q. Did you go into the house? A. Yes. I did.

Q. Who was there?

A. Nobody was there but Dan.

Q. The defendant in this case? A. Yes.

Q. What did he do when you got in there, the first thing?

A. He locked the door and pulled down the blinds.

Q. Then what did you do? (Witness sobs.) What did you do? A. Laid down on the bed.

Q. Did you remove any of your clothes?

(Testimony of Grace Carey.)

(Defendant, by his attorney, objects to leading questions and suggestive questions being put to the witness. The Court directs the attorney for plaintiff to first proceed without asking leading questions.)

Q. State whether or not anything was done to your clothing.

(Defendant, by his attorney, objects as leading and suggestive, and the Court directs that what was done should be first stated.

Q. All right. Go ahead and state everything that was done as you remember it there, Grace.

(Defendant, by his attorney objects to the question; objects to the witness giving volunteer testimony as to what was done there, as the witness has not been shown incapable of answering direct questions. Objection to the question overruled, and defendant asks and is given an exception.)

A. Well, I went in and I took my drawers off and I went on the bed and then Dan got on top of me.

Q. Go ahead.

A. Then he had full sexual intercourse, and I got up and put my drawers back on and I went home. I went out the door and I met Laura Herrington just a little ways, and I showed her the three dollars that Dan gave me and I told her what he [50] gave it to me for, and I told her that he had pushed me for it.

Q. Did the defendant Dan Callahan have sexual intercourse with you before that time?

(Testimony of Grace Carey.)

A. Yes. Lots of times.

Q. When was the first time?

(Defendant objects as irrelevant, incompetent and immaterial. Objection overruled. Defendant asks and is given an exception.)

Q. When was the first time, Grace?

A. Before he went down to Ruby.

Q. How old were you?

A. I was only about nine years old, about ten; either nine or ten.

Q. Tell the jury who was the first man that ever had sexual intercourse with you?

(Defendant objects as irrelevant, incompetent and immaterial. Objection overruled, and defendant asks and is given an exception.)

A. Dan Callahan.

Q. Where did that occur?

A. Over to Dan Callahan's house.

Q. Did he give you anything particular after that?

A. Yes. He gave me twenty-five cents.

Q. Where else now, after that first time, did he have sexual intercourse with you?

A. Over at his barn, and at his house, and another little house right near the barn.

Q. In the town of Fairbanks? A. Yes.

Q. Did you ever tell anybody about this except Laura Herrington? A. No.

Q. Is she the only one? [51] A. Yes.

Mr. ROTH.—You may cross-examine.

(Testimony of Grace Carey.)

Cross-examination.

(By Mr. TOZIER.)

Q. Who told you to say that Dan Callahan had full sexual intercourse with you?

A. Mr. Roth told me the word; that was all.

Q. Mr. Roth told you the word.

A. Yes. I asked him the word.

Q. You asked him that word. A. Yes.

Q. When did you ask him that? A. To-day.

Q. You never knew that term before.

A. I never knew that word. No.

Q. Mr. Roth has seen you a good many times about this case, has he not? A. Why, yes.

Q. So, when you answered a while ago that you had never told anybody but Laura Herrington about it, you were mistaken, weren't you? You had told Mr. Roth about it, hadn't you?

A. I thought he meant if I had told anybody except the Grand Jury and him.

Q. How did you come to go up to Mr. Roth's office the first time you went up to his office?

A. Joe Miller came down after me and told me Mr. Roth wanted to see me.

Q. When was that? A. I don't know.

Q. How long ago? [52]

A. It has been over a month ago, I know.

Q. Before the Grand Jury met?

A. I don't know. Before I went in front of the Grand Jury is all I know.

Mr. TOZIER.—That is all.

Testimony of Laura Herrington, for Plaintiff.

LAURA HERRINGTON, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Laura Herrington.

Q. How old are you? A. Fourteen years.

Q. Are you acquainted with the defendant Daniel Callahan? A. Yes, sir.

Q. Did you see Grace Carey the latter part of last June in the town of Fairbanks? A. Yes.

Q. Where were you living at that time? Where was your home at that time? A. In Fairbanks.

Q. Did you attend the celebration of the—children's celebration, the Midnight Sun Celebration?

A. Yes.

Q. With reference to that time, when was it that you saw Grace Carey, or can you fix the time?

A. No. I don't remember.

Q. I will ask you where you saw her? [53]

A. Coming from Dan Callahan's house.

Q. Where were you?

A. Coming up the street. I was by Petree's house.

Q. You were by Petree's house. A. Yes.

Q. In front of Petree's house? A. Yes.

Q. Just tell what occurred between you and Grace at that time.

(Defendant objects as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the facts in this case. Objection overruled, and de-

(Testimony of Laura Herrington.)

fendant asks and is given an exception.)

Q. Go ahead now and state what was said and occurred between you and Grace at that time.

A. She showed me the money he gave her.

(Defendant moves to strike answer, plaintiff consents and the Court strikes out the answer.)

Q. Just state what Grace said to you, and what was done.

(Defendant objects, unless it is shown more clearly that it has a bearing upon the actions of this defendant and the witness Grace Carey who was formerly upon the stand; and in any event it would only be hearsay, and not binding upon defendant; that it is not corroborating evidence. Objection overruled, and defendant asks and is given an exception.)

Q. Go ahead.

A. She told me she did something with Dan to get the money.

(Defendant moves to strike answer. Motion denied, and defendant asks and is given an exception.)

Q. What money are you referring to?

A. The money he gave her.

(Defendant objects to the answer and moves that it be stricken. Motion denied, and defendant asks and is given an exception.)

Q. What did she show to you? Did she show you anything there?

(Defendant objects as leading and suggestive. Objection overruled. Defendant excepts. Exception allowed.) **[54]**

(Testimony of Laura Herrington.)

Q. Answer the question: Did she show you anything? A. Yes.

Q. What did she show you?

(Defendant makes the same objection. Objection overruled. Defendant asks and is given an exception.)

A. Three dollars.

Q. What did she say to you, the exact words that she said to you when she showed you the three dollars?

(Defendant objects as incompetent, irrelevant and immaterial. Objection overruled, and defendant asks and is given an exception.)

Q. Now, state the exact words she said to you.

(Defendant makes same objection; same ruling and exception allowed.)

A. She said he did something to her.

Q. Is that what she said? Is that the exact language she used? A. No.

Q. I want the exact language she used.

(Same objection by defendant; same ruling and exception.)

Q. State the exact language she used.

A. She said that Dan had pushed her.

(Defendant objects and moves to strike answer. Objection overruled, motion denied, and an exception allowed.)

Q. Did you ever have a conversation with Dan Callahan, the defendant in this case, in his house, about Grace Carey? A. Yes.

(Defendant objects for the further reason that it

(Testimony of Laura Herrington.)

does not tend to prove any of the facts at issue in this case, or disprove them. Objection overruled, and defendant asks and is given an exception.)

Q. When was that? How old were you when that conversation took place?

A. Twelve years old. [55]

Q. Just tell this jury what Dan Callahan said to you at that time about Grace Carey.

A. He said he did that to Grace and that she was not afraid.

(Defendant moves to strike the answer as not responsive to the question. Motion denied, and defendant asks and is given an exception.)

Mr. ROTH.—You may cross-examine the witness.

Cross-examination.

(By Mr. TOZIER.)

Q. You and Grace have talked this thing over quite a number of times, haven't you, Laura?

A. Yes.

Q. Talked it over as to what you were going to testify to here and as to what she was going to testify to.

A. Yes.

Q. You have talked it over with Mr. Roth, too, haven't you? A. Yes.

Q. And you girls also talked over about the money you were going to get for coming here, witness fees and such as that? A. Yes.

Q. That you were getting a nice thing out of these cases. You and Grace had that talk together?

(Plaintiff objects as irrelevant, incompetent and

(Testimony of Laura Herrington.)

immaterial. Objection sustained. Defendant excepts, and asks and is given an exception.)

Q. You and Grace have been very good friends for a long time, haven't you, Laura, ever since you have been little girls? A. Yes, sir.

Q. And you talked over about everything that occurs, do you, you and Grace, as girl chums do?

A. Yes. [56]

Q. And you tell her things and she tells you things. Is that it? A. Yes.

Q. You were living on Ester Creek when you say you met Grace over there by Petree's residence, were you? A. No. I didn't say that.

Q. But you were living on Ester Creek, were you not, at that time? A. No.

Q. Weren't you living there last summer in June, that is, the summer of 1915?

A. Yes. I was living there then.

Q. You were living there on Ester Creek then?

A. Yes, sir.

Q. How came you to be in town at that particular time when you say you met her?

A. I came in for the carnival.

Q. Was this just before the carnival or just after the carnival that you met Grace there?

A. I don't remember.

Mr. TOZIER.—That is all.

Mr. ROTH.—That is all.

Testimony of Joe Mock, for Plaintiff.

JOE MOCK, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Joe Mock.

Q. Are you acquainted with Daniel Callahan, the defendant in this case? A. Yes, sir. **[57]**

Q. Are you acquainted with Grace Carey?

A. Yes, sir.

Q. Where were you on the 25th day of June, 1915, between 12 and 1 o'clock?

A. I was in front of Mr. Healey's house, in the garden, watering the plants.

Q. Where did you first see Grace Carey at that particular time?

A. She was coming up from Barnette Street towards—well, towards where I was.

Q. Now, on the corner there, upstream from the Healey house, whose residence is it on the corner?

A. Next to Healey's?

Q. No. Upstream on the corner of the street whose house is that; up this way from Healey's on the corner, whose house is that?

A. Mr. Carey's. You mean upstream?

Q. Yes.

A. Oh, Callahan's.

Q. Is Callahan's on the corner?

A. No. Dave Petree's.

Q. Mr. Dave Petree's is on the corner, then whose is the next one down? A. Callahan's.

(Testimony of Joe Mock.)

Q. And the next one— A. It is Jack Healey's.

Q. Now, where did Grace Carey go when you first saw her? How did she go?

A. Well, she came walking up there towards—as far as Callahan's place, then she kind of stalled; then she came over to me and got some flowers. [58]

Q. What kind of flowers? A. Pansies.

Q. Did you give them to her? A. Yes, sir.

Q. Where did she go from there?

A. Well, she still stalled around there.

Q. Where did she go after she left there?

A. I didn't see that—where she went to, because I went away.

Q. Where did you go?

A. I went across right down towards Second, between Healey's warehouse and Bert Smith's residence.

Q. Now, at the time that Grace Carey came along there, do you know where the defendant Dan Callahan was?

A. He was sitting in front of his house on the porch.

Q. Did you notice his windows before you left and went down Second Street? A. Yes.

Q. How were the curtains?

A. Some of them was up.

Q. How long were you gone when you went down towards Second Street?

A. Oh, maybe about ten minutes. I don't know but what more.

Q. Did you come back? A. Yes, sir.

(Testimony of Joe Mock.)

Q. Did you see any change at the Callahan house when you came back? A. Yes, sir.

Q. What did you see?

A. All the curtains down, all the blinds.

Q. Did you notice where Callahan was then?

A. I didn't see him.

Q. No. And what did you do immediately after that, when you [59] saw those curtains down?

A. I went down town.

Q. What was your purpose in going down town?

(Defendant objects as irrelevant, incompetent and immaterial, having no bearing on this case whatever. Sustained.)

Q. Well, after you came down town, how long did you stay down town?

A. Oh, maybe fifteen or twenty minutes.

Q. Where did you go then?

A. I went back up home to the cabin.

Q. To which cabin?

A. I had to go right through Mr. Healey's place to get back to my cabin.

Q. What did you see at the Callahan house then?

(Defendant objects as irrelevant, incompetent and immaterial. Objection overruled. Defendant excepts. Exception allowed.)

A. The blinds were still down.

Q. Still down? A. Yes, sir.

Q. Then where did you go?

A. I went down town.

Q. How long did you stay down town?

A. It might have been twenty or thirty minutes.

(Testimony of Joe Mock.)

Q. Did you go back to the Callahan house again?

A. Yes.

Q. What did you see there then?

A. The blinds were still down.

Q. Still down? A. Yes, sir.

Q. Did you see the Callahan house again after that?

A. Then I didn't see it for some time. [60]

Q. Well, some time. How long would that be?

A. Oh, maybe an hour after that.

Q. Well, what did you see then when you saw it?

(Defendant objects as incompetent, irrelevant and immaterial. Overruled. Defendant excepts. Exception allowed.)

A. Well—(Interrupted).

Q. About the blinds, what did you see?

Mr. TOZIER.—We object.—(Interrupted).

A. They were up.

Mr. TOZIER.—(Continuing.) —to the district attorney suggesting. That is leading and suggestive.

The COURT.—The question is answered.

Mr. ROTH.—Q. Did you see the defendant at that time—Callahan? A. No. Not that time.

Q. When did you see Callahan the first time after you saw him sitting on the porch there, and where did you see him?

A. I met him down town. It was either on Second or Third Street as I came up the third time.

Q. What date was that, do you say?

A. The 25th.

(Testimony of Joe Mock.)

Q. 25th of what month? A. 25th of June.

Q. What year? A. 1915.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. TOZIER.)

Q. You and Callahan have been having considerable trouble, Mr. Mock, haven't you, here lately?

A. I don't see that I had any trouble. **[61]**

Q. But Callahan has been objecting to your employment by the city?

A. That was his play, not mine.

Q. You understood that, didn't you, Joe?

A. Yes.

Q. And along about that time he was objecting to your employment by Chief Wiseman, wasn't he?

A. He has been doing that right along.

Q. You lived out there in Callahan's cabin for a while, didn't you—back? A. I did.

Q. And you don't like Callahan very well, do you?

A. I had nothing against him.

Q. No? A. No.

Q. You feel perfectly friendly towards him?

A. I always feel the same as usual to him.

Q. What?

A. Always treat him the same as usual.

Q. You always treat him the same as usual.

A. Yes, sir.

Q. Do you believe in the sanctity of an oath, Joe?

A. Yes, sir.

Q. You do. You believe in our form of Government? A. Yes, sir.

(Testimony of Joe Mock.)

Q. You haven't had any trouble at all with Callahan personally, have you? A. Not on my account.

Q. Not on your account? A. No. [62]

Q. Well, on his account, wasn't it?

A. The trouble all started from his side.

Q. He was the one that was to blame for everything.

A. He wanted to start trouble. I had nothing to start.

Q. You would kind of like to see him convicted?

A. I would like to see anyone convicted that oversteps the law.

Q. That oversteps the law. A. Yes.

Q. Particularly Callahan?

A. Not necessarily.

Q. Not necessarily. I think that is all, Joe.

Mr. ROTH.—That is all.

Mr. TOZIER.—I would like to have this witness recalled. (Witness resumes the witness-stand.)

Q. What kind of curtains were those over at Callahan's house? A. Were what?

Q. What kind of curtains were those over at Callahan's house, on the order of these that roll down and up? A. Yes, sir, he had some of those.

Q. He had some of those. A. Yes.

Q. Did you go all around the house and look at all the curtains? A. No, sir.

Q. You just looked at the curtains on that side—

A. On the side and the front.

Q. —on the side next to Healey's?

A. On the side next to Healey's and the front. [63]

(Testimony of Joe Mock.)

Q. Have you noticed the curtains there lately?

A. No.

Q. Do you know whether the same curtains are there now as were there on the 25th of June when you say you noticed them?

A. I have not paid any attention to them.

Q. Isn't it a fact that there are none of these roller curtains on that side of the house?

A. If they are changed I can't help it.

Q. Don't you know they were not there then—roller curtains? A. They were there then.

Q. Green curtains? Roller curtains?

A. I don't know if they were roller or not roller, but they were shades.

Q. What color along there?

A. I couldn't say what color.

Q. You don't remember that? A. No.

Q. You don't remember whether the curtains dropped down from the side or rolled down from the top.

A. They looked to be regular shade curtains.

Q. Like regular shades, like these roller curtains here? A. Yes, sir.

Q. How many of those curtains did you notice, Joe?

A. I noticed on that side of the house, and the front.

Q. What time of day did you say that was?

A. It was between twelve and one.

Q. Twelve and one o'clock in the daytime?

A. Yes, sir.

(Testimony of Joe Mock.)

Q. What kind of a window was that on the side of the house [64] next to Healey's house? That would be the west side of the house.

A. There is two windows there.

Q. Two windows there?

A. On the side towards Healey's.

Q. Do you know how many rooms are in Callahan's house? A. Yes.

Q. Do you know how many rooms were in Callahan's house on the 25th day of June, 1915?

A. No. I did not.

Q. And you say there are two windows on the side next to Mr. Healey's residence. A. Yes, sir.

Q. What size windows are they there?

A. One is a—there is one what they call a bedroom window. It is high up, with one glass.

Q. Just one pane of glass?

A. One pane of glass.

Q. About what size would you say that is, Joe?

A. It might be about 24 by 4 feet or 5 feet.

Q. You don't mean 24 feet?

A. No. No. 24 inches wide.

Q. 24 inches. A. Yes, sir.

Q. What kind of a window is the other window?

A. Just a common window. Just one sash.

Q. Just one sash. Is it a small window or a large window? A. Well, four lights.

Q. Four panes of glass, you mean?

A. Four panes of glass.

Q. Would that be the front window or the back window? [65]

(Testimony of Joe Mock.)

A. That would be the back window.

Q. Do you know if the curtains on this front window was a green sash curtain like these here in the courtroom, that is, of that color?

A. Well, I couldn't say for sure it was green.

Q. You don't know what color the other was on the back window?

A. No. They seemed to be light.

Q. Do you know whether the front window is a window of one room and the back window of another room, or are they both windows of one room?

A. They used to be of a room separate.

Q. They used to be for two separate rooms.

A. Yes.

Q. What kind of windows were the front windows, Joe? A. The front window?

Q. Yes.

A. Well, one there is a full-size window, two sashes.

Q. They are one pane windows?

A. Two sashes.

Q. You mean two panes of glass, one above the other?

A. Two sashes of regular common window, something like those. (Indicating windows in courtroom.)

Q. There are two panes of glass in them, I mean. A pane of glass in each sash; two sashes with a pane of glass in each sash?

A. I don't know for sure if there was one pane or two panes in each sash. I think there are two panes or more.

(Testimony of Joe Mock.)

Q. You think there are two panes in each sash.

A. Yes, sir.

Q. And there are two sashes.

A. Two sashes, similar to the windows here. [66]

Q. In the courtroom. A. Yes.

Q. Not as large as them, however?

A. No. A smaller size.

Q. But similar in construction to these windows.

A. Yes, sir.

Q. How many front windows are there, Joe?

A. There are two.

Q. Two front windows. A. Yes, sir.

Mr. TOZIER.—I think that is all, Joe.

Mr. ROTH.—That is all.

Testimony of Marion Carey, for Plaintiff.

MARION CAREY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. Marion Carey.

Q. Are you the father of Grace Carey?

A. I am.

Q. The witness who was just on the stand here this forenoon? A. Yes, sir.

Q. How old is she?

A. She is fifteen years old to-day, the 23d day of March.

Q. Was she ever married? A. No, sir.

Q. She is not the wife of the defendant Dan Callahan, then? A. No, sir.

Q. Where was she born? [67]

(Testimony of Marion Carey.)

A. Circle City.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. TOZIER.)

Q. She was born, then, on the 23d day of March, 1901. A. Yes, sir.

Q. At Circle City, Alaska. A. Yes, sir.

Mr. TOZIER.—That is all, Mr. Carey.

Testimony of J. J. Buckley, for Plaintiff.

J. J. BUCKLEY, a witness for plaintiff, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. Mr. Buckley, what official position do you hold in the city of Fairbanks?

A. Municipal Clerk and magistrate and Chief of the Fire Department.

Q. Do you know where the residence of Dan Callahan in the town of Fairbanks is? A. Yes, sir.

Q. Is that in the Fourth Judicial Division, Territory of Alaska? A. Yes, sir.

Q. As clerk of the town of Fairbanks, city clerk of the town of Fairbanks, I will ask you to state whether you have the record of registration of voters? A. I have.

Q. Have you in your possession now the registration of the defendant Daniel Callahan? [68]

A. I have.

Q. The last time that he registered in the city?

A. Yes.

Q. Will you please turn to it? (Witness opens a

(Testimony of J. J. Buckley.)

book.) What date does that bear?

A. The 6th day of January, 1916.

Q. Is it signed? A. Yes, sir.

Q. By whom? A. Dan Callahan.

Q. Do you know his handwriting?

A. Yes, sir.

Q. Did he sign that? A. Yes, sir.

Q. Did you see him sign it? A. Yes, sir.

Q. Is it sworn to? A. Yes, sir.

Q. Before whom? A. Myself as Magistrate.

Q. Does that affidavit disclose the age of Dan Callahan? A. Yes, sir.

Q. What age? A. Fifty-one years.

Mr. ROTH.—That is all. You may cross-examine.

Mr. TOZIER.—No questions.

Mr. ROTH.—The Government rests.

(Recess until 3:30 P. M. to-day at request of attorney for defendant, and jury withdraw in charge of bailiffs, with the usual admonitions. After recess, at 3:30 P. M. March 23, 1916, jury, and defendant and his attorney, and district attorney present, and trial resumed.) **[69]**

Mr. TOZIER.—I would like to have the witness Grace Carey recalled for further cross-examination.

The COURT.—Very well.

Testimony of Grace Carey, for Plaintiff (Recalled—Cross-examination).

GRACE CAREY, witness for plaintiff, heretofore sworn, takes the stand for further cross-examination.

(Testimony of Grace Carey.)

(By Mr. TOZIER.)

Q. Grace, how long were you in Callahan's house?

A. I don't know.

Q. I mean on the 25th day of June?

A. I don't know.

Q. Was it a very, very long time or a short time?

A. Well, I think it was a short time.

Q. A very short time, was it not? Just a few minutes, wasn't it, Grace?

A. I couldn't say. I don't know.

Q. Well, haven't you some recollection of it, Grace? A. It wasn't a very short time.

Q. Would you say it was ten minutes?

A. I couldn't say.

Q. What is it? A. I couldn't say.

Q. Fifteen minutes? That is a quarter of an hour.

A. Yes, it was about fifteen or ten minutes.

Q. About ten or fifteen minutes?

A. Yes. It was.

Q. It wasn't any longer than that; it wasn't a half hour? A. No.

Q. Nor anything like that. It was not anything like half an hour? A. No.

Q. It was about ten or fifteen minutes you think. You just went [70] right in and something was done, and you came right out? A. Yes.

Q. That was all, was it? I think that is all, Grace.

Redirect Examination.

(By Mr. ROTH.)

Q. He says, "Something was done." Just tell

(Testimony of Grace Carey.)

further, while you are on the stand, how—you stated that the curtains were drawn. Just tell the jury how those windows were covered.

(Defendant objects as not proper redirect examination. Mr. Roth asks permission to ask the question even though it might not properly be redirect. Permission granted by the Court. Defendant excepts, and is given an exception.)

Mr. ROTH.—Q. Just tell the jury how the windows were covered.

A. He covered them with a shawl or a blanket. I don't know which it was.

Q. Which—(Interrupted).

A. The one window.

Q. The one window?

A. Yes. On that side of the house. (Indicating with her arm.)

Q. And the other windows, how were they?

(Defendant objects unless witness states she knows.)

Q. (Continuing.) If she knows.

A. The other ones had blinds on them.

Q. As I understand, one was covered either with a shawl—(Interrupted).

A. Or a blanket.

Q. Or a blanket, and the other curtains were drawn. A. Yes.

Mr. ROTH.—That is all.

(By Mr. TOZIER.)

Q. How many windows are there there? [71]

(Testimony of Grace Carey.)

A. I don't know.

Q. You don't know how many there are.

A. I know there are two—(Interrupted).

Q. You didn't know at that time—(Interrupted).

Mr. ROTH.—She was answering there were two—(Interrupted).

A. There was two on one side, and one in the front on one side and one on the other, and none on the other side, and some in the kitchen.

(Mr. TOZIER.)

Q. That is your description of the house you are—(Interrupted.)

A. You asked me how many windows.

Q. You don't mean now those are windows he covered?

A. He covered two windows in the front room and two in the bedroom.

Q. With a blanket or what?

A. He covered one with a blanket in the front room, and the others with blinds.

Q. The rest with blinds. A. Yes.

Q. The one on the side, was that covered with a blanket or a blind? A. With a blanket or shawl.

Q. That is the one on the side next to the Healey house? A. Yes.

Q. There was no curtain on that window, was there? A. No.

Q. No curtain of any kind? A. No. **[72]**

Q. That window was just completely bare, was it?

A. Yes.

Q. And the ones in front, you say, were the ones

(Testimony of Grace Carey.)

that the blinds were on. A. Yes.

Q. So that the one that was next to the Healey house had no blinds on it, and he just covered that with a shawl or blanket. A. Yes.

Q. And you don't remember what that was. Is that right? A. Yes.

Mr. TOZIER.—That is all.

Mr. ROTH.—That is all.

(Trial continued until 10 A. M. to-morrow, and the jury, after being admonished by the Court as usual, withdrew from the courtroom in the charge of the two bailiffs.) **[73]**

March 24, 1916, 10 A. M.

Defendant and his attorney, and the District Attorney and the jury present in court, and trial resumed.

Mr. ROTH.—The Government rests.

(Mr. Tozier requests that jury withdraw, as he desires to present a motion, whereupon the Court orders the jury to withdraw to the jury-room, which they do in charge of the bailiffs, after being admonished as usual by the Court.)

Mr. TOZIER.—The defendant now moves that the evidence of the witness Laura Herrington, in so far as the same relates to any conversation she may have had with the witness Grace Carey, testified as having occurred on the 25th day of June, 1915, regarding the relation or relations of the witness Grace Carey with this defendant Daniel Callahan as having occurred on the said 25th day of June, and in particular that part of the conversation oc-

(Testimony of Grace Carey.)

curring between the witness Laura Herrington and the witness Grace Carey, wherein the witness Laura Herrington, testified that Grace Carey showed her, Laura Herrington, three dollars and made the remark that she had received the three dollars from this defendant, Daniel Callahan, and that the said Daniel Callahan had pushed her, should be stricken from the record and the jury instructed to disregard said testimony, for the reason that the same is mere gossip, hearsay, and could have no bearing upon this case, and serves to prejudice the rights of the defendant, Daniel Callahan, in this case.

(Motion denied. Defendant asks and is given an exception.)

The defendant Daniel Callahan now moves the Court to instruct the jury to return a verdict of not guilty in this case, for the reason that the Government has failed to prove the material elements of the indictment herein, and that no crime has been proved. **[74]**

(Motion denied. Defendant asks and is given an exception.)

(The jury return into court, and the trial proceeds.)

Testimony of Daniel Callahan, for Defendant.

DANIEL CALLAHAN, defendant, a witness in his own behalf, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. TOZIER.)

Q. Mr. Callahan, you are the defendant in this

(Testimony of Daniel Callahan.)

case. A. Yes, sir.

Q. You reside at the town of Fairbanks, Alaska.

A. Yes, sir.

Q. How long have you resided at Fairbanks?

A. Since 1903.

Q. Continuously at Fairbanks since that time?

A. Yes, sir.

Q. You mean by that, that your home has been in Fairbanks,— A. Yes, sir.

Q. —since the year 1903. A. Yes, sir.

Q. What is your age, Mr. Callahan?

A. Fifty-one years old.

Q. Fifty-one years past? A. Yes, sir.

Q. When was your birthday?

A. 12th day of August.

Q. You were fifty-one years of age on the 12th day of August, 1915. A. Yes, sir.

Q. Do you know the witness Grace Carey that appeared here yesterday in this case?

A. Yes, sir. **[75]**

Q. Do you know the witness Laura Herrington that appeared here yesterday in this case?

A. Yes, sir.

Q. Do you know the father and the mother of the witness Grace Carey? A. Yes, sir.

Q. What is the blood of the mother of Grace Carey? A. Indian.

Q. What is the blood of the mother of Laura Herrington? A. Indian.

Q. Did you see the witness Grace Carey on the 25th day of June, 1915? A. I don't know.

(Testimony of Daniel Callahan.)

Q. By that, do you mean that you do not remember as to the date? A. Yes, sir.

Q. Did you see the witness Grace Carey after the 25th day of June, 1915? A. Yes, sir.

Q. Where did you see her?

A. Well, I have seen her mostly every day one place and another.

Q. She lives back of your house, on Fourth Avenue. A. Yes, sir.

Q. Does she come to your house frequently?

A. Yes, sir.

Q. She was there both before and after the 25th day of June, coming and going? A. Yes, sir.

Q. She is acquainted with your wife, Mrs. Callahan. A. Yes, sir. **[76]**

Q. You live with your wife at your residence in Fairbanks, do you? A. Yes.

Q. How long have you been married, Mr. Callahan, to your present wife?

A. About fifteen years or sixteen. Fifteen years. Sixteen years.

Q. She is also an Indian woman, is she not?

A. Yes, sir.

Q. Has she been living continuously with you at your residence in Fairbanks, Alaska, since the year 1903 or 1904?

A. Well, not continuously. She has been on a visit to her daughter over in Circle City either twice, I think, or three times.

Q. She has lived with you as your wife during all of that time. A. Yes, sir.

(Testimony of Daniel Callahan.)

Q. Her residence has been there with you.

A. Yes, sir.

Q. And you and she have been occupying the relation of husband and wife.You have been living together as husband and wife. A. Yes, sir.

Q. And does she now live at your residence on Third Avenue in Fairbanks? A. Yes, sir.

Q. Your wife is also acquainted with the witness Grace Carey? A. Yes, sir.

Q. Were they friendly or otherwise? Do you know? A. Friendly, I suppose.

Q. You heard the evidence of Grace Carey given here yesterday that she came to your house on the 25th day of June, 1915; **[77]** that you had sexual intercourse with her; that you gave her the sum of three dollars as payment for that sexual intercourse; and that she left your house soon thereafter. Is that true or untrue? A. Untrue. Untrue.

Q. You heard her testimony yesterday that she had sexual intercourse with you when she was ten or nine years of age, and that you were the first man that ever had sexual intercourse with her; and that at that time she testified that she had sexual intercourse with you the first time, as she stated, you gave her the sum of twenty-five cents. Is that true or untrue? A. Untrue, sir.

Q. You heard her testimony that she, since having had intercourse with you the first time as she testified, had frequently had sexual intercourse with you in a cabin, in a barn, and I am not sure but some other place in the town of Fairbanks. Was that tes-

(Testimony of Daniel Callahan.)

timony true or untrue?

A. It is untrue and impossible.

Q. Have you ever had sexual intercourse with the witness Grace Carey? A. No, sir.

Q. You stated that it was impossible for you to have sexual intercourse with her. Why do you so state?

A. I have not had sexual intercourse with a woman since I was hurt about—(Interrupted).

Q. What do you mean by "when you were hurt"?

A. I fell here about six years ago.

Q. Whereabouts were you?

A. I fell down at the brewery. [78]

Q. Which brewery?

A. Down at the lower brewery, down below here, when it was running.

Q. Was that the brewery known as the Greenland brewery? A. Yes, sir.

Q. Situate at the extreme lower part of town?

A. Yes, sir.

Q. What was the occasion, you say, of your falling there?

(Plaintiff objects.)

Q. What caused the fall, I mean.

A. Well, I was down there after some malt, and I drove around to the spout. There is a man who is living here now, named Wiener. He was shoveling the malt out from up above in the brewery, and he called me for something,—I didn't know what it was. I couldn't hear from where I was very well what it was—and asked me to come up, and I went

(Testimony of Daniel Callahan.)

up to where he was shoveling this out of a vat that was there. And as you go up the stairs and over to where the vat was, there was a runway of about maybe three feet, and it was just after they had got done their brew and they were washing kegs and cleaning out the vats and such stuff with warm water, and it was all steamy, and when I had the conversation—I don't just remember, but I think it was something about wood. I can't just remember what the conversation was—and when I turned around to go back the steam was so much that I stepped off of this and fell, and I suppose it must have been ten or twelve feet, and as I was going down I grabbed something on the side of the wall and kind of broke the fall and turned my shoulder out, and then I fell on some beer kegs that were below. **[79]**

Q. Where did you strike on those beer kegs with regard to your body? A. I struck on my back.

Q. What injury did you receive from that fall?

A. I turned my shoulder out, and then I hurt myself across the small of the back, the spleen it is called.

Q. What result do you now suffer from that fall as regards your shoulder, if anything? (Objected to. Overruled.)

A. My shoulder is stiff. I can work her this way (indicating), but I can't get it higher up than that. (Showing.)

Q. Can you raise your right arm as high as your head? (Witness raises left arm.) No. But your right arm.

(Testimony of Daniel Callahan.)

A. I can shove it up this way. (Showing.)

Q. Did you have your injuries treated after you had fallen there? A. Yes, sir.

Q. What physician treated you, Mr. Callahan?

A. Doctor Sutherland and Doctor Pohl.

Q. Doctor Emil Pohl, formerly a physician here in Fairbanks? A. Yes, sir.

Q. Do you know where Doctor Pohl is now?

A. Doctor Pohl is dead.

Q. Do you know where Doctor Sutherland is now?

A. No. I do not. He is outside some place. I don't know where he is. He was the Aerie physician at that time and had been for years.

Q. By the Aerie physician, you mean he was the Aerie physician of the Fraternal Order of Eagles.

A. Yes, sir.

Q. Well, then, you were a member of the Eagles, were you? A. Yes, sir. [80]

Q. Did you draw any benefits from the Fraternal Order of Eagles for that illness that you had as a result of that fall?

(Plaintiff objects. Overruled.)

A. Yes, sir. I drew the full benefits from the Eagles.

Q. Now you say, Mr. Callahan, that you have not had sexual intercourse with any woman since that fall occurred. A. No, sir.

Q. Do you remember what year it was that you were hurt, and about what time of the year?

A. I can't just remember the time. It was either the latter part of October, or November—first of November, 1910.

(Testimony of Daniel Callahan.)

Q. In the year 1910? A. Yes, sir.

Q. Now, why did you state that you had not had sexual intercourse with a woman since you had that fall? Is there any particular reason for stating that?

A. Nothing more than that I never did. I had, the doctor told me—(Interrupted).

(Plaintiff objects as irrelevant, incompetent, immaterial, hearsay and a self-serving declaration. Mr. Tozier claims that witness has a right to state what he was advised by a physician; and the Court states that witness may testify to what the treatment was. Mr. Tozier claims that the advice was part of the treatment.)

Q. What physician was it that you had this conversation with, that advised you, Mr. Callahan?

A. Doctor Pohl.

Q. Just state what that was.

(Plaintiff objects on same grounds. Objection overruled.)

A. Well, I think it was February, 1911, I was in —or March, 1911, I was in Doctor Pohl's office. Doctor Sutherland, when he was not here, if he was out on the creeks, or any place, and he [81] was not here, why Doctor Pohl took care of his patients; and I was in there this day, and he said that I was getting along very well, that there was nothing much the matter with my arm now only it was stiff. I think those cords here had been carried so long that I couldn't straighten it. I had carried it in a sling so long that I couldn't straighten it, those cords got

(Testimony of Daniel Callahan.)

drawed. And I told him I didn't care so much about that, only I told him that I hadn't erections—this other had never got stiff since I had got hurt. Then he started to question me, how I had lived, and so on, and what was the reason, and how I had lived for years before, and if I had ever been sick, and what kind of sickness I had; and I told him, and he advised me that I should not drink, and that I shouldn't use tobacco, and that I might come to in time.

Q. What sickness did he ask you about?

A. Well, he asked me if I ever had the gonorrhoea, and what other things, mostly the gonorrhoea, if I had ever had that, and I told him I had.

(The Court calls Mr. Tozier's attention to the fact that the evidence has gotten far beyond the offer, and states that the witness may testify as to the advice he received or treatment that he received with reference to the injuries of which he complains. Argument.)

Q. Did you, in this conversation with Doctor Pohl, Mr. Callahan, tell Doctor Pohl of your previous life?

A. Yes, sir.

Q. What had been your previous condition as to your sexual ability prior to the time you had that fall? A. I had told him—(Interrupted).

(Mr. Roth objects.)

Q. Answer the question: What was your physical condition in regard to your sexual ability, and by that I mean your ability to have sexual intercourse

(Testimony of Daniel Callahan.)

with a woman, [82] prior to the time you had that fall?

A. Well, for a couple of years it didn't amount to much. I couldn't more than once a month, sometimes not that often, for a year or two previous to this fall, maybe three years.

Q. Then you had noticed, you say, that you were waning, that you were losing at that time your sexual ability. A. Yes, sir.

Q. Did you tell that to Doctor Pohl?

A. Yes, sir.

Q. Did or did not Doctor Pohl advise you that your fall had anything to do with your sexual ability?

A. Yes. He said that that was what brought it on thoroughly.

Q. That is, that that—(Interrupted).

A. Was the final wind-up to it.

Q. What did he say to you, if anything, Mr. Callahan, in regard to your recovering from your inability to perform sexual intercourse?

A. Well, he said if I took very good care of myself, not drink or use tobacco, that it might come back. He said that in any event I would grow fat and heavy.

Q. Have you grown fat and heavy since then?

A. Yes, sir.

Q. How much weight have you taken on since 1910, approximately, do you know?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained. Defendant excepts. Exception allowed.)

(Testimony of Daniel Callahan.)

Q. Now, did Doctor Pohl prescribe for you at that time any medicine to relieve you from your sexual inability, or did he advise you in regard to that matter?

A. The only advice he gave me—he advised me; no medicine. **[83]** He advised me for to not to drink or not to use tobacco.

Q. And you say that since that time you have not had sexual intercourse with any woman?

A. Yes, sir.

Q. Have you had erections of the penis?

A. No, sir. I have not.

Q. I understood you to say that you told Doctor Pohl that you had had the gonorrhoea?

A. Yes, sir. I told him I had it about two years.

Q. At one time? A. Yes, sir.

Q. Had you had it oftener than once?

A. Yes. I have had it several times.

Q. You say you had it for two years at one time?

A. Yes, sir.

Q. What treatment, if any, did you take at that time?

A. Well, I was up in British Columbia—(Interrupted).

Q. Before you came to Alaska? A. Yes, sir.

Q. When did you come to Alaska, Mr. Callahan?

A. 1908.

Q. 1908. Proceed now and tell about what treatment, if any, you had in British Columbia?

A. Well, I was about a hundred and ten miles from a little town called Revelstoke, up in what was called—(Interrupted).

(Testimony of Daniel Callahan.)

(Plaintiff, by Mr. Roth, objects as irrelevant, incompetent and immaterial. Mr. Tozier states that he will follow it up by expert testimony and show the result of certain treatment of gonorrhoea and the effect that it has—a prolonged case of gonorrhoea unattended to—has upon the sexual ability of the male. Objection overruled.)

A. (Continuing.) I was working up in what was called the Big Bend country and I was up there for about a year and a [84] half, and I got some stuff out of the company store, what they call the "Big G," and I used that as an injection.

Q. You mean the company store was the Big G, or the medicine was the Big G? A. The medicine.

Q. How was that used, in what manner?

A. By a syringe.

Q. Injection? A. Yes, sir.

Q. Into the penis? A. Yes, sir.

Q. And did you use that steadily?

Q. Yes. I used it quite often.

Q. What were you doing there in the Big Bend country, Mr. Callahan? A. I was packing.

Q. With horses? A. Yes, sir.

Q. You were riding a good deal? A. Yes, sir.

Q. Mr. Callahan, you heard the testimony yesterday of the witness Laura Herrington to the effect that she had visited your house when she was about twelve years of age, and that you had a conversation with her there wherein you stated to her, "He said he did that to Grace. That she wasn't afraid." Did you

(Testimony of Daniel Callahan.)

ever have such a conversation with the witness Laura Harrington at your house or elsewhere?

A. No, sir. [85]

Q. You heard the witness Joe Mock testify here yesterday, Mr. Callahan—you are acquainted with him? A. Yes, sir.

Q. How long have you known him?

A. Since 1900 or 1901, I don't remember which; 1900 or 1901.

Q. A little louder.

A. Since 1900 or 1901. I don't just remember. Somewhere along there.

Q. What is the present relationship between you and Joe Mock as regards your friendship? Are you friendly or otherwise?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection overruled.)

A. We are not friendly.

Q. How long has that unfriendliness existed, Mr. Callahan?

(Plaintiff makes same objection. Overruled.)

A. Since a year ago last fall.

Q. You are, and have been for a number of years, a member of the City Council of Fairbanks?

A. Yes, sir.

Q. What was the nature of the unfriendliness between yourself and Mr. Mock?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained. Defendant asks and is given an exception.)

Q. Have you ever had a conversation—I mean by

(Testimony of Daniel Callahan.)

ever having had a conversation, have you, since the time you say this unfriendliness between yourself and Joe Mock began, had a conversation with Joe Mock in regard to his duties as an employee of the City of Fairbanks?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained. Defendant asks and is given an exception.) [86]

Q. Have you and Joe Mock had any quarrel since that unfriendliness began, as you stated, over his employment by Chief Wiseman in performing work for the City of Fairbanks?

(Plaintiff objects on all the grounds last stated. Mr. Tozier states that the question is presented with the purpose of contradicting the testimony of Joe Mock. Objection overruled.)

Q. (Continuing.) By "quarrel" I mean what is known as hot words. A. Yes.

Q. Mr. Callahan, did you ever at any time when Grace Carey was in your residence in Fairbanks pull down the blinds at your windows in your residence or put a shawl or a blanket over any one of the windows? A. No, sir. I did not.

Q. Mr. Callahan, do you think of anything else that you want to testify to at this time that I have not asked you about?

Mr. ROTH.—That is objected to—(Interrupted).

Mr. TOZIER.—Just a minute. (Continuing.) —that appeared in the testimony of any of the witnesses that appeared upon the stand here yesterday?

(Plaintiff objects as irrelevant, incompetent and

(Testimony of Daniel Callahan.)

immaterial, too indefinite. Objection sustained and the Court states that Mr. Tozier may examine the testimony and see if he desires to *any* any questions. Defendant asks and is allowed an exception.)

Q. How long, Mr. Callahan, have you known Grace Carey? A. Since she was born.

Q. How long have you known Laura Herrington?

A. Since she was born.

Mr. TOZIER.—You may cross-examine. [87]

Cross-examination.

(By Mr. ROTH.)

Q. When did you say that you came to Alaska?

A. 1898.

Q. You said 1908. I thought you misspoke yourself and meant to say 1898. When was it that you had that two-year dose of gonorrhoea?

A. About—just before I came to Alaska. I just got better before I came to Alaska.

Q. Had you gotten well before you came to Alaska in 1898? A. Practically.

Q. You were practically well then? A. Yes.

Q. I suppose you were entirely over it by the time that you got married? A. Yes, sir.

Q. You were not impotent when you married your wife, were you? A. I didn't understand you.

Q. You were not impotent when you married your wife, were you?

A. I don't understand the question.

Q. Well, you could—(Interrupted).

The COURT.—Capable of sexual intercourse.

A. Yes, sir.

(Testimony of Daniel Callahan.)

Mr. ROTH.—Q. Were you capable of having sexual intercourse when you married your wife?

A. Yes, sir.

Q. You were all right when you married her.

A. Yes, sir.

Q. And how long a time after you got over this bad dose of gonorrhoea was it that you began to be unable to get an erection? [88]

A. Well, from—I don't know—1905 or 6 I started to fail.

Q. You said you had several other doses of gonorrhoea besides this long one, did you? A. Yes, sir.

Q. Were they before or after? A. Before.

Q. All before? A. Yes, sir.

Mr. ROTH.—That is all.

Mr. TOZIER.—That is all.

Testimony of Mrs. Daniel Callahan, for Defendant.

MRS. DANIEL CALLAHAN, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. TOZIER.)

Q. Your name is Mrs. Callahan. A. Yes, sir.

Q. You are the wife of Dan Callahan, the man seated on my left? A. Yes, sir.

Q. How long have you been married to Dan Callahan? A. Sixteen years.

Q. Where were you married? A. Circle City.

Q. Circle City, Alaska. A. Yes.

Q. Where do you live, Mrs. Callahan?

A. Circle City.

(Testimony of Mrs. Daniel Callahan.)

Q. No. Where do you live now?

A. Fairbanks.

Q. How long have you lived at Fairbanks?

A. I think it is twelve years ago. [89]

Q. Twelve years? A. Yes.

Q. Have you been living with Dan Callahan here in Fairbanks? A. Yes, sir.

Q. For twelve years? A. Yes, sir.

Q. Do you know Grace Carey? A. Yes, sir.

Q. How long have you known Grace Carey?

A. Oh, since I guess she is born.

Q. Do you know Laura Herrington?

A. Yes, sir.

Q. How long have you known Laura Herrington?

A. Oh, since she is born in Circle City.

Q. Are you an Indian woman? A. Yes, sir.

Q. Is Mrs. Herrington, the mother of Laura Herrington, an Indian woman?

A. Yes, sir. She is an Eskimo.

Q. Is Mrs. Carey, the mother of Grace Carey, an Indian woman? A. Yes, sir.

Q. Laura Herrington come to your house often?

A. Oh, yes, since this started. After they started this Wooldridge case that time started coming to our house.

Q. Does Grace Carey come to your house often?

A. Often.

Q. Were you away from Fairbanks and over at Circle City last summer? A. Yes, sir. [90]

Q. What time did you leave Fairbanks to go to Circle City?

(Testimony of Mrs. Daniel Callahan.)

A. Oh, I can't tell that. I know it was June some time I go away.

Q. Some time in June you went to Circle City?

A. Yes, sir.

Q. When did you come back, Mrs. Callahan?

A. Oh, I don't know. It was pretty near the last boat.

Q. Pretty near the last boat.

A. Yes. I guess after me two steamboats came.

Q. After you two steamboats came back?

A. Yes, sir.

Q. Did you see Grace Carey at your house after you came back? A. Yes, sir.

Q. Did she come there often?

A. Often. Just go through the house all the time; come back door and go through the house; go down town, come back again and go through the house again.

Q. Why did she do that?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained.)

Q. Did Laura Herrington come to your house after you came back from Circle City?

A. Oh, I guess two or three times.

Q. Grace Carey lives over back of your house on Fourth Avenue, don't she? A. Yes.

Q. Yes. Mrs. Callahan, do you understand what sexual intercourse means? A. No.

Q. Do you understand what you call "push" means? A. I guess so. [91]

Q. By "push" do you understand that means the

(Testimony of Mrs. Daniel Callahan.)

way men and women make babies? What is it?

A. Yes.

Q. And that is what you call when men and women go together that way, you call that what?

A. I don't know. I don't know English enough to call that.

Q. You call it push? A. Yes, I call it that.

Q. How long has it been, Mrs. Callahan, since your husband, Dan Callahan, pushed you?

A. Oh, I don't know. It is a long time.

Q. How long you think?

A. Why, I can't tell you. Since he got hurt.

Q. Since he got hurt where? A. Arm.

Q. Not push you since that time?

A. Oh, he tried to. He can't.

Q. What is the matter?

A. I don't know. He can't make him strong.

Q. By "strong" you mean he can't make his penis hard? A. No.

Q. Limber all the time? A. Yes.

Q. Before Dan got hurt on the shoulder, he push you much? A. Oh, not very often.

Q. What is the matter then? A. I don't know.

Q. You talk to Dan about that?

A. Well, one time he is going outside, I told him: "You better see the doctor what is the matter with you," and I guess he never did. **[92]**

Q. That is the time he went out to Seattle?

A. Oh, he go through that Seattle.

Q. Before that, you spoke to Dan to see the doctor?

A. Yes, and he come back just the same.

(Testimony of Mrs. Daniel Callahan.)

Mr. TOZIER.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. You remember talking to Grace Carey over at the hospital just a couple of days after Dan was arrested in this case? A. Yes.

Q. In the parlor at the hospital?

A. Parlor downstairs?

Q. Yes, the parlor downstairs. A. Yes.

Q. And nobody there but you and Grace?

A. Yes.

Q. You and Grace alone? A. Yes.

Q. Didn't you tell Grace that time that you wanted her to help Dan out? A. No, sir.

Q. Didn't you say, "Grace, I want you to help Dan out this time?" A. No, sir.

Q. All right. Down at your house, didn't you have a talk with Laura Herrington when her mother, Mrs. Herrington, was there? A. Yes.

Q. A few days after Dan was arrested on this charge? A. Yes.

Q. Didn't you tell Laura—didn't you ask Laura to try and mix [93] it all up, try to mix her story all up? A. I never say like that.

Q. You never said like that at all. A. No.

Q. Never said anything like that. A. No.

Q. Nothing like it? A. No.

Mr. ROTH.—That is all.

Testimony of Dick Callahan, for Defendant.

DICK CALLAHAN, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. TOZIER.)

Q. Your name is Dick Callahan. A. Yes, sir.

Q. You are an adopted son of Dan Callahan.

A. Yes, sir.

Q. You live in Fairbanks, Alaska? A. Yes, sir.

Q. Do you live with Dan Callahan and Mrs. Callahan, his wife, at the residence on Third Avenue?

A. Yes, sir.

Q. Were you in Fairbanks during the summer of 1915? A. Yes, sir.

Q. What were you doing? What work, if any, were you doing A. I was teaming, driving horses.

Q. Do you know Grace Carey?

A. Yes, sir. **[94]**

Q. Do you know Laura Herrington?

A. Yes, sir.

Q. Did you see Grace Carey at Mr. Callahan's residence where you live—(Interrupted). A. Yes.

Q. Just a moment before you answer. (Continuing.) —last fall?

A. I seen her around there sometimes last fall.

Q. Frequently? A. Yes.

Q. Did you see Laura Herrington over there last fall? A. Yes.

Q. The house of Dan Callahan is between the residence of Grace Carey and her people, and the down town part or Front Street, is it not? A. Yes.

(Testimony of Dick Callahan.)

Mr. ROTH.—There are lots of other houses-

Mr. TOZIER.—I will fix it definitely. Q. And, in going to and from the postoffice, and the N. C. store, and places like that—what we call down in town—did Grace Carey, and her little sister Irene before she died, frequently pass through the Callahan house?

A. Yes. They went right through it.

Mr. TOZIER.—You may cross-examine.

Mr. ROTH.—No questions.

(Fifteen minutes recess, jury in charge of bailiffs. After recess, defendant and jury in court, and the attorneys, and trial resumed.) [95]

Testimony of H. J. McCallum, for defendant.

H. J. McCALLUM, a witness for defendant, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. TOZIER.)

Q. Your name is H. J. McCallum. A. Yes.

Q. What is your business?

A. I practice medicine here in Fairbanks.

Q. How long have you been practicing medicine at Fairbanks? A. Close to nine years.

Q. Are you a graduate of any college? A. Yes.

Q. What college? A. University of California.

Q. How long have you been practicing medicine?

A. About twenty-one or twenty-two years,.

Q. Where have you practiced, doctor?

A. California and Dawson and Fairbanks.

Q. Any place else? A. No.

Q. During the course of your practice, have you had occasion to treat patients for impotency?

(Testimony of H. J. McCallum.)

A. We occasionally meet with some. Yes, sir. I have had some.

Q. Have you had occasion to investigate the causes of impotency?

A. In only the general way that we are taught in the schools by the text-books. I have had a limited experience.

Q. And have you had occasion to treat gonorrhoeal cases? A. Yes, sir. We have lots of them.

Q. What, doctor, from your experience and knowledge as a physician gleaned from your practice and your reading and [96] education, would you say are the causes of impotency in the male?

(Plaintiff objects to the question as too general. Objection overruled.)

A. There are a great many factors that produce impotency in a man. A man that has been previously virile, one of the most common causes is a long period of masturbation, then the various nervous diseases like locomotor ataxia and paresis and those various diseases that affect the spinal cord, produce impotency, and gonorrhoea sometimes is followed by impotency, and sometimes a high state of living, too much dissipation, tends to and will produce it in some cases.

Q. Would you say, doctor, that a man who had had the gonorrhoea a number of times, and who had had one case of gonorrhoea lasting a period of two years or more, might, after he had reached the age of forty-five years, suffer from impotency as a result of those cases of gonorrhoea, and particularly as a re-

(Testimony of H. J. McCallum.)

sult of the prolonged case of gonorrhoea lasting over a period of two years as aforesaid?

(Objection.)

Q. (Continuing.) If the prolonged case of gonorrhoea had occurred at a period before midlife, and by that I mean before the age of forty-five.

(The Court suggests that the question be made to conform to the testimony.)

Q. (Continuing.) —and from the age of thirty to thirty-two years.

A. Well, I could only say that it could be a determining factor. Nothing but a thorough examination at the time would uncover the fact that it is the cause. It might be or it could be a determining factor in impotency. **[97]**

Q. Would an examination determine that the gonorrhoea was the cause of the impotency, and by "determining" I mean obsolutely convince you, or would an examination be useless so far as actual knowledge as to the cause of the impotency is concerned. (Objection. Question withdrawn.)

The COURT.—Examination at what time?

Mr. TOZIER.—I withdrew that question.

Q. You mean, an examination of the man at the time he had the gonorrhoea, do you, Doctor?

A. Yes, sir. Yes.

Q. That is, subsequent examination made years afterward would not absolutely determine that the gonorrhoea was the cause of it?

A. It would only—you would have to discover an ulcer or some defect in the prostate gland. The pros-

(Testimony of H. J. McCallum.)

tate gland appears to be the source of sexual power. It appears to have more to do with the sexual appetite than any other part of the body—the prostate gland, and any pathological defect in that gland affects the sexual vigor of the man. And if you examined a man that was suffering from impotency and he told you that he had a dose of gonorrhoea, and you examined the prostate gland—a full examination with your electric mirror—you would expect to cure those sores to cure his impotency. You would attribute his impotency to the presence of those sores, probably, more or less. It might be some other thing.

Q. But if one had permitted that condition to continue for a year without attempting to remedy it in any way, it would finally become chronic, would it not—the impotency, I mean—and be incurable? [98]

A. I could answer that. Every man is more or less a law to himself. There are men suffering all the time from prostatic trouble that don't seem to have much loss of sexual vigor; but in an individual where you find those lesions, and he tells you he is impotent, you would attribute the impotency to those lesions more or less.

Q. What class of men, Doctor, as regards physique, has it been your experience are more apt to become impotent. That is the question: What class of men, as regards your experience, Doctor, as to their physique, are more apt to become impotent?

(Mr. Roth objects as irrelevant, incompetent and immaterial, and too general. The Court suggests to

(Testimony of H. J. McCallum.)

Mr. Tozier that he make the limitation, as the doctor does not know whether the question refers to whether a man is short or tall or what, and Mr. Tozier states that he will make the limitation.)

Q. Are men who are inclined to be corpulant more apt, as a result of disease such as you described, to become impotent, than men of the other build—the slender build?

A. I couldn't answer that question, Mr. Tozier. I have no authority to answer that one way or the other, and from my own experience I wouldn't care to say so, not in direct answer to that question.

Q. Very well.

A. As far as the generative organs are concerned, I have noticed in my past experience that lots of large men have organs that are under size. That is the only difference I have noticed. The size of the man bears no ratio to the size of his generative organs. That has been my experience.

Q. And it makes no difference as to his physique, then, in your estimation—as to his build,—(Interrupted). A. No, sir. [99]

Q. —as regards impotency. A. No, sir.

Q. One man is as apt to become impotent as another.

A. Yes, sir. I have no statistics or experience—(Interrupted).

Q. Is there any age at which a man is more apt to become impotent than at any other age, Doctor?

A. It depends largely on his natural sexual vigor and the kind of life he has lived. I have a work on

(Testimony of H. J. McCallum.)

sexual disability of men by a great authority who declares in New York City that the average man over fifty is impotent.

Mr. TOZIER.—You may cross-examine.

Cross-examination.

(By Mr. ROTH.)

Q. In case of a man having a very severe case of gonorrhoea at the age of thirty and continuing say to the age of say thirty-two, a continuous period of two years, and that he gets over the disease of gonorrhoea to all intents and purposes—(Interrupted).

A. That is, the discharge ceases to run?

Q. I am putting it this way: Suppose that he gets over it; that he is an unmarried man at the time he gets over it; afterwards he gets married and he is normal—he is normal from the age say of thirty-three or thirty-four up to the age of, we will say, forty-three or forty-four, perfectly normal for a period of about ten years, sexually normal, no impotency or signs of impotency; would you in case of subsequent impotency attribute that at all to the gonorrhoea that he had ten years before—ten or twelve years before? A. No, sir; I could not. [100]

Q. The fact that he had been normal during a period of ten years would be, from a scientific or medical standpoint, proof that the gonorrhoea had not affected his prostate gland at all?

A. Yes, sir; it would exemplify that fact.

Mr. ROTH.—That is all.

(Testimony of H. J. McCallum.)

Redirect Examination.

(By Mr. TOZIER.)

Q. In many cases, Doctor, the man might recover sufficiently to have no discharge, and yet the gonorrhoeal germ, or whatever medical term you might have for it, might remain in his system and affect him, might it not?

A. It is supposed—in some cases the germ is supposed to inhabit the prostate gland for periods of some years, but I couldn't say how many years, but it has been—commonly two or three years anyway—but it has been supposed to linger in the prostate gland for some years.

Q. Do modern physicians, present day physicians, I mean, lay great stress upon the injuries to the human system resulting from gonorrhoea, as compared to the injuries resulting from syphilis?

(Plaintiff objects as irrelevant, incompetent and immaterial and no foundation. Objection sustained. Defendant asks and is allowed an exception.)

Q. How long has the germ of gonorrhoea been known to inhabit the human system, Doctor, do you know? (Objection. Question withdrawn.) Speaking, Doctor, of the glands affected by gonorrhoea; after they have once been seriously affected say as they would be by a dose, as we call it, of gonorrhoea lasting over a period of two years, do they ever become absolutely normal? [101]

(Plaintiff objects, and defendant withdraws question.)

Q. What is the medical term or scientific term for

(Testimony of H. J. McCallum.)

the neck of the bladder, Doctor?

(Plaintiff objects, and defendant withdraws question.)

Q. What do you understand by the prostate gland, Doctor?

A. The prostate gland is a mass of spongy tissue that surrounds the neck of the bladder. Through its substance the urethra passes for about an inch and a half. It surrounds the first portion of the urethral canal as it leaves the bladder for about an inch; and through its substance the ejaculatory glands that convey the semen from the testicles pass through its substance.

Mr. TOZIER.—That is all.

Mr. ROTH.—That is all.

Mr. TOZIER.—The defendant rests.

Testimony of Grace Carey, for Plaintiff (in Rebuttal).

GRACE CAREY, witness for plaintiff, called in rebuttal and heretofore sworn, testified as follows, to wit:

Direct Examination.

(By Mr. ROTH.)

Q. A few days after the defendant, Mr. Callahan, was arrested in this case, at the St. Joseph's hospital, in the parlor of the hospital, yourself and Mrs. Daniel Callahan being there together alone, did Mrs. Callahan ask you to help Dan out this time?

A. Yes. She did.

Mr. ROTH.—You may cross-examine. [102]

(Testimony of Grace Carey.)

Cross-examination.

(By Mr. TOZIER.)

Q. Mrs. Callahan called over there to the hospital and you were called down stairs, were you not, Grace? A. Yes.

Q. And went into the room where she was down there. A. Yes.

Q. Down stairs? A. Yes.

Q. And there you and Mrs. Callahan had a conversation. A. Yes.

Q. About this trouble that Dan was in, and Mrs. Callahan asked you at that time, did she not, "What is the matter? What do you say Dan do that for?" She said that, didn't she? A. Not that I remember of.

Q. Didn't she ask you that, Grace, there at that time?

A. She asked me—she told me to tell who the first fellow was who done it—that is all I remember—and I told her I did tell.

Q. Yes. And she also asked you, did she, Grace, "What you say this about Dan for? You know that is not true."

A. No. She didn't say that to me.

Q. She didn't say that at all. A. No.

Q. How long were you in the room there with her, Grace? A. I don't know.

Q. How long did you talk to her?

A. I don't know.

Q. Was that all that was said between you?

A. I don't remember what she said.

(Testimony of Grace Carey.)

Q. You don't remember what she said?

A. I don't remember what else she said. **[103]**

Q. Who spoke first?

A. Why, she did. She sent for me. She told the Sister she wanted to see me, and the Sister came up.

Q. And you went down stairs. A. Yes.

Q. And went in there. Now, all you remember is the very question that Mr. Roth asked you. That is all you remember that was said. Is that it?

A. She said Dan was going to have a new jury, and she wanted me to try and help her that time, this time.

Q. That she didn't want you to do anything against Dan. Is that what she said?

A. I guess that is what she meant. She didn't say it just like that.

Q. What was the language that she used?

A. I don't know. She said, "I want you to try and help me," or "have mercy on me," something like that, "this time, because Dan is going to have a new jury." She wanted me to help him out this time, because Dan was going to have a new jury.

Q. "Dan was going to have a new jury." Did she use that language?

A. No. She didn't use that exact language, but that is what she meant, that is the meaning of it.

Q. You think, then, that is what she meant, when you testified a minute ago?

A. Yes. I know that is what she meant.

Q. That is what she meant. You don't remember anything she said there positively, do you; it is just

(Testimony of Grace Carey.)

what you think she meant.

A. I know she wanted me to try and help Dan because he was going to have a new jury. She might have put something **[104]** else in it, but that is what she said.

Q. You are sure she said that.

A. I know she said he was going to have a new jury, and she was wanting me to help out Dan, and she told me to tell who the first fellow was, and I said I did,—that Dan Callahan was.

Q. You didn't tell her that Dan Callahan was, did you? A. Yes. I did.

Q. You didn't tell that to Mrs. Callahan that day?

A. That Dan Callahan was the first one?

Q. Yes. A. I know I did.

Q. You are positive of that? A. Yes.

Q. What else was said there, Grace?

A. She told me why I didn't tell on some of the young boys around town here that did that?

Q. What did you say?

A. I told her, because none of the young boys had ever tried to do it.

Q. That was your answer, was it.

Q. That was your answer, was it?

A. Yes.

Q. You now remember all of those things that were said there? A. Yes.

Q. That was the exact language that was used?

A. No. That is not the exact language she used. That is what she meant.

(Testimony of Grace Carey.)

Q. So you are testifying now, are you, Grace, about what Mrs. Callahan meant when she talked with you there that day? A. Yes. [105]

Mr. TOZIER.—That is all, Grace.

Mr. ROTH.—That is all.

Testimony of Laura Herrington, for Plaintiff (in Rebuttal).

LAURA HERRINGTON, a witness for plaintiff, in rebuttal, having been heretofore sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. Laura, two or three days after the defendant was arrested on this charge were you and your mother at the residence of Mrs. Callahan?

A. Yes.

Q. At that time and place, in the presence of yourself and your mother and Mrs. Callahan,—no one else being present,—did Mrs. Callahan say to you, "Try to mix your story all up." A. Yes.

Mr. ROTH.—You may cross-examine.

Cross-examination.

(By Mr. TOZIER.)

Q. Who else was there?

A. My mother and I. I don't remember.

Q. Wasn't Mrs. Durgan there, too?

A. Well, I was there so many times I don't remember.

Q. No. You don't remember whether Mrs. Durgan was there at that time or not. A. No.

(Testimony of Laura Herrington.)

Q. And you don't remember whether there was anybody else there at that time except you and your mother and Mrs. Callahan.

A. That is all I remember of.

Q. And she didn't tell you what story, did she, Laura? **[106]**

A. No. She just told me to try and mix it all up.

Q. Mix it all up. And that was all that was said between you at that time?

A. Well, she talked of other things.

Q. That is all she said about this matter?

A. Yes.

Q. How long were you there, Laura?

A. I don't know.

Q. Were you there five minutes?

A. I was there longer than that.

Q. Ten minutes? A. I don't know.

Q. Fifteen minutes? A. I don't know.

Q. Half an hour?

A. I am not able to tell how long I was there.

Q. What is that?

A. I am not able to tell how long I was there.

Q. If you were able, you would tell?

A. I am not able.

Q. Who did you go there with?

A. My mother.

Q. How long did you stay there?

A. I don't know.

Q. Have quite a conversation there, did you?

A. I don't know.

Q. General conversation? A. Yes.

(Testimony of Laura Herrington.)

Q. Your mother talked with Mrs. Callahan?

A. Yes.

Q. You talked to Mrs. Callahan? A. Yes.

[107]

Q. You talked to Mrs. Durgan?

A. I don't know if she was there or not.

Q. But you don't know how long you stayed?

A. No.

Q. Nobody sent for you to go over there?

A. No.

Q. You and your mother just walked in there. Was that it?

A. Knocked at the door, of course.

Q. Who knocked? A. I did.

Q. You were just making a friendly call, were you? A. Yes.

Q. On Mrs. Callahan? A. Yes.

Mr. TOZIER.—I think that is all, Laura.

Redirect Examination.

(By Mr. ROTH.)

Q. Where is your mother, now?

A. She is at home.

Q. Is she sick? A. Yes.

Q. Do you think she will be well enough to come up here this afternoon?

A. Yes. I think she would.

Mr. ROTH.—That is all.

Further Cross-examination.

(By Mr. TOZIER.)

Q. What is the matter with your mother?

(Testimony of Laura Herrington.)

A. She is sick.

Q. What is the trouble with her? **[108]**

(Plaintiff objects as irrelevant, incompetent and immaterial.)

Q. You know what is the matter with your mother? A. Yes. I know.

Q. What is the matter with her?

A. She is sick. That is all I know.

Q. What kind of sickness? A. I don't know.

Q. How do you know she is sick?

A. That is all I know.

Q. Is that the best answer you can give?

A. Yes.

Mr. TOZIER.—That is all.

Mr. ROTH.—That is all.

(The Court takes a recess until 2 P. M. to day and the jury, after being admonished by the Court in the usual manner withdraw in charge of the bailiffs. At 2 P. M., March 24, 1916, the jury come into court and answer to their names, and the defendant and his attorney and the district attorney are present in court and the trial is resumed.)

Mr. ROTH.—The witness, Mrs. Herrington that we spoke of is not in physical condition to take the stand, and therefore the Government rests.

(The jury withdraw from the courtroom, at the request of Mr. Tozier, they being in the custody of the bailiffs.) At 2:15, P. M., March 24, 1916, the jury return into court and answer to their names, and the defendant and his attorney and the district

attorney are present; and the trial is resumed.)

Mr. TOZIER.—The defendant rests.

TESTIMONY CLOSED. **[109]**

The case was argued to the jury by the attorneys for the respective parties, and during the closing argument made on behalf of the prosecution by R. F. Roth, Esq., United States District Attorney, the following occurred:

"Mr. ROTH.—You noticed that I challenged the statement of Mr. Tozier that Grace Carey testified that the last time that she was at the Callahan house was on the 25th day of June. I made that challenge of that statement because my understanding was that she testified that that was the last time that she had sexual intercourse with defendant Callahan, and I have no doubt at all that that is what was intended, because there is no doubt but what Grace Carey had been to the Callahan house many times since. That is an immaterial matter. There is no doubt but what she had been there many times since, and if I had understood that statement, why, of course, I would have had that corrected by asking Grace if she had been there later.

Mr. TOZIER.—We object to that. That is not a proper statement to go to a jury, of an attorney, if your Honor please; for an attorney such as Mr. Roth to stand before this jury and say: If I had understood a certain thing, I would have introduced certain evidence. That is not proper, and not a fair statement to go before the jury. It is what he did; it is what has been done in the trial of this

case; not what Mr. Roth might have introduced if he had understood a certain situation.

The COURT.—Either attorney may explain what he believes the evidence means.

Mr. TOZIER.—That is true, but not what he might have introduced in evidence. **[110]**

The COURT.—What he should do, or what he might have done, are matters that are not for the consideration of the jury. The jury will find upon what has been done and what they believe to be a logical deduction or reasonable theory to be drawn from the evidence, and find the facts accordingly."

The arguments to the jury having been completed, the Court read its written instructions to the jury, as follows:

[Caption and Title.]

Instructions to the Jury.

GENTLEMEN OF THE JURY:

1.

The defendant Daniel Callahan is accused by the Grand Jury of the crime of rape, and he is now on trial before you.

The indictment charges that the said Daniel Callahan on the twenty-fifth day of June, A. D. 1915, at Fairbanks in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, did then and there willfully, unlawfully and feloniously, carnally know and abuse one Grace Carey, a female child, then under the age of sixteen years, to wit; of the age of fourteen years, he, the said **[111]** Daniel Cal-

lahan being then and there a male person over the age of twenty-one years.

2.

The defendant has entered a plea of not guilty, and such plea controverts and denies each and every essential element of the crime charged in the indictment, and places the burden upon the prosecution of proving each such element, beyond a reasonable doubt, before you can find the defendant guilty of said crime so charged.

3.

You are instructed that the jury and the Judge of this court have separate functions to perform.

It is your duty to hear all the evidence, all of which is addressed to you, and to decide thereupon all questions of fact. It is the duty of the Judge of this court to instruct you upon the law applicable to the facts and evidence in this case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions.

And you are instructed that these instructions are to be taken and considered by you together as a whole.

4.

You are instructed that the indictment is a mere accusation, and is not, in itself, any evidence of the defendant's guilt. **[112]**

5.

The defendant is presumed to be innocent of the crime charged against him in the Indictment until he is proven guilty, beyond a reasonable doubt, by the evidence produced in this case and submitted to

you, and this presumption of innocence is a right guaranteed to the defendant by the law, and remains with him and should be given full force and effect by you, until such time in the progress of the case as you are satisfied of his guilt, from the evidence, beyond a reasonable doubt. The presumption of innocence is not a mere form to be disregarded at pleasure, but it is an essential and substantial part of the law of the land binding on the jury in this case, as in all criminal cases.

6.

You are instructed that the term "reasonable doubt" as defined by the law and used in these instructions, is that state of the case which, after a careful comparison and consideration of all the evidence in the case leaves the minds of the jury in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge.

The term "reasonable doubt" does not mean any doubt; but such doubt must be actual and substantial, as contradistinguished from mere vague apprehension, and must arise out of the evidence, or from a want of evidence, or from both such sources.

A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence, or lack of evidence, in the case; and **[113]** the evidence is sufficient to remove all reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act

upon the conviction without hesitation in their own most important affairs of life.

Proof beyond a reasonable doubt does not mean proof beyond all doubt.

7.

You should not consider any evidence sought to be introduced, but excluded by the Court, nor should you consider any evidence that has been stricken by the Court from the record, nor should you take into account, in making up your verdict, any knowledge or information known to you not derived from the evidence given upon the witness-stand.

8.

The jury are instructed that they are the sole judges of all questions of fact in this case, and they should determine the same from the evidence in the case. But your power in this connection is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence laid down in these instructions.

9.

In considering the evidence in this case, you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses, when their evidence does not produce conviction in your minds, against a lesser number of witnesses, or other evidence, which is satisfying to your minds. **[114]**

10.

In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct

and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the case; the probability or improbability of such witness' statements; the opportunity he had to observe and to be informed as to matters respecting which he gave testimony before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within the knowledge of such witness. It is your duty to give to the testimony of each and all of the witnesses appearing before you such credit as you consider the same justly entitled to receive.

And in this connection you are instructed that evidence is to be estimated not only by its intrinsic weight, but also according to the evidence which it is within the power of the one side to produce, and of the other to contradict; and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence is within the power of the party offering the same, the evidence so offered should be viewed with distrust. **[115]**

11.

You are instructed that if you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part, or all, of the testimony of such witness. And, if you believe from the evidence that any witness appearing before you in this case has wilfully testified falsely, you are at liberty to reject the entire testi-

mony of such witness; but you are not bound to reject the entire testimony of a witness because he has testified falsely in some part of his testimony, you should reject the false part, and should give to the other parts such weight as you may deem they are justly entitled to receive. The foregoing instruction is applicable to female as well as male witnesses.

You should not fail to weigh and consider fairly and give proper weight to all testimony which you consider truthful.

12.

There is some evidence in this case as to oral admissions and statements of some of the parties to this case, to persons who have appeared before you as witnesses and testified to the same.

I charge you that, owing to the infirmity of the human mind and the inability of witnesses to repeat the exact language used by persons alleged to have made such oral admissions and statements, and to understand it correctly and repeat it with all its intended meaning, you are to view the evidence as to such oral admissions and statements with caution; but if you should find and believe that such oral admissions and statements were actually made by the person or persons alleged [116] to have made them, you should consider them as candidly and fairly as other evidence in the case, and give them weight accordingly.

13.

You are instructed that a person charged with the commission of a crime shall, at his own request, but not otherwise, be deemed a competent witness in his

own behalf, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court.

You are instructed that in this case the credit to be given to the testimony of the defendant Daniel Callahan (who has appeared at his own request as a witness before you), is left solely to you, and you should give to it the same fair and candid consideration you do to the other witnesses in the case, but you are entitled to take into consideration the interest of the defendant in the result of the trial, as affecting his credibility.

14.

You are further instructed that the question of punishment is reserved for the Court, and that the jury have nothing to do with that branch of the case, and are not to consider the same.

It is for you to determine solely whether or not the defendant is guilty of the crime charged in the Indictment. The matter of the form and severity of the punishment, in event of conviction, is to be left to the discretion of the Court. [117]

15.

You are instructed that corroborating evidence must be such as tends to connect the accused with an alleged offense, and, as distinguished from evidence of the act itself, is additional evidence of a different character to the same point. It means to strengthen, to add weight or credibility, to a thing.

16.

You are instructed that there are two general classes of evidence; direct and circumstantial.

Evidence as to the existence of the main fact in issue, is direct evidence; while circumstantial evidence relates to the existence of facts which raise a logical inference as to the existence of the fact in issue.

If the evidence in this case discloses that a portion of the evidence is circumstantial, you are instructed that the same is legal and competent evidence, and is to be considered by you in connection with any direct evidence offered, in arriving at the facts disclosed by the evidence.

Circumstantial evidence is to be regarded by the jury in all cases where it is offered. It is sometimes quite as conclusive in its convincing power as the direct and positive testimony of eye witnesses, and, when it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force.

In order to warrant a conviction, both direct and circumstantial evidence considered together must be of a conclusive nature and tendency, leading to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused committed the offense charged. [118]

17.

You are instructed that whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.

18.

The intent to have sexual intercourse, where the

female is under the age of consent, is an essential element in the crime, and must be proved beyond a reasonable doubt; and this may be done by proof of any facts or circumstances tending to show such intent. In this case, it is also essential that the Government prove beyond a reasonable doubt that the act of sexual intercourse charged in the Indictment was committed on the 25th day of June, 1915; that at said time the girl Grace Carey was under the age of sixteen years; and that said act of sexual intercourse actually occurred.

19.

You are instructed that to constitute the crime of rape, it is necessary that penetration be shown, but, if penetration be shown to have actually taken place as a matter of fact, the degree of penetration is immaterial.

Penetration, as herein used, means the penetration of the female organ of a female with the male member or penis of a male. [119]

20.

You are further instructed that it is the policy of our law, as expressed in the statute, that any female under the age of sixteen years shall be incapable of consenting to the act of sexual intercourse, and that anyone committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtained her consent thereto; and whether the girl in fact consented or resisted is immaterial in this case. In this case neither the element of force nor the question of consent has any application. The wit-

ness Grace Carey could not consent, and the law resists for her.

21.

The Government would not be required to show the age of Grace Carey by a family record or any instrument; such proof may be made by oral testimony of witnesses, and said Grace Carey is a competent witness as to her age, and such testimony may be based upon information with respect thereto, if any she may have, from her parents.

22.

You are further instructed that evidence of previous acts of sexual intercourse between the defendant and the witness Grace Carey, prior to the time of the act charged in the Indictment, is received and admitted in evidence to prove the disposition of the defendant herein, and as having a tendency to render it more probable that the act of sexual intercourse charged in the Indictment was committed on the 25th day of June, 1915, and for no other purpose. [120]

23.

You are instructed that if you believe, beyond a reasonable doubt, that the witness Grace Carey told the witness Laura Herrington of the act of sexual intercourse alleged to have been committed upon the said Grace Carey by the defendant, and that said Laura Herrington was the first person she met after said alleged act, and that it was the said Grace Carey's first opportunity to tell any person, and that said statement was made immediately after leaving defendant's house after said alleged act of sexual intercourse was completed, then that may be con-

sidered by you as a corroborating circumstance tending to sustain the truth of the statement of the said Grace Carey as to what had just transpired beween her and the defendant.

24.

You are instructed that in the case of rape it is not essential that the one upon whom the rape is alleged to have been committed should be corroborated by the testimony of other witnesses as to the particular act constituting the offense; and if the jury believe, beyond a reasonable doubt, from the testimony of the witness Grace Carey, and the corroborating circumstances and facts testified to by other witnesses, that the defendant did commit the crime as charged, the law would not require that the witness Grace Carey should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the crime was committed. [121]

25.

You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant Daniel Callahan, being then and there over the age of twenty-one years, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 25th day of June, 1915, did have carnal knowledge of Grace Carey and did penetrate the female organ of Grace Carey with his male member or penis, and that said Grace Carey was then and there a female under the age of sixteen years, and was not then and there the wife of the defendant Daniel Callahan, you will find the defendant guilty of the crime of rape as charged in the Indictment.

26.

The jury are instructed that, while it is a rule of law that the prosecution is not bound to prove a crime alleged in the indictment to have occurred upon the day set forth in the indictment, but may prove it to have occurred at any time prior to the day alleged in the indictment, but within three years prior to the date of the finding of the indictment, nevertheless, where, as in this case, the prosecution by its evidence has elected to prove an offense upon a certain day, to wit, the 25th day of June, 1915, they are bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant at the time and place testified to by the witnesses in this case, and in the manner and form as charged in the indictment, before you can find the defendant guilty. [122]

27.

The jury are instructed that evidence has been introduced on the part of the prosecution for the purpose of proving that at other times prior to the 25th day of June, 1915, the time of the alleged offense upon which they rely for a conviction, the defendant had sexual intercourse with the witness Grace Carey, and the jury are further instructed that you cannot convict upon any of these previous offenses, although you may believe beyond a reasonable doubt that they occurred as testified to by the witness Grace Carey, for the reason that the defendant is not upon trial for those offenses, or any of them; the only purpose for which you can consider such evidence, if you believe the same to be true, is upon the question of the

design or intent of the defendant, and as bearing upon the likelihood or probability of the defendant having committed the offense charged in the indictment, and for no other purpose.

28.

The charge of rape against a person is easy to make, difficult to prove, and more difficult to disprove, and in considering a case of this kind, it is the duty of the jury to carefully and deliberately consider, compare and weigh all the testimony, facts and circumstances bearing upon the acts complained of, and the utmost care, intelligence and freedom from bias should be exercised by the jury in the consideration thereof. [123]

29.

Your duty to society and to this defendant obligates you to give your earnest and careful attention to every feature of the case now on trial before you, so that the defendant may not be unjustly convicted nor wrongfully acquitted.

Under the solemnity of your oaths as jurors, you must consider all of the evidence in the case, under the instructions of the Court, and upon the law and the evidence you must reach, if you can, a just verdict, which the law and the rights of this defendant demand of you. And, in determining the guilt or innocence of the defendant under the evidence, it becomes your duty to accept the law of the case as laid down in these instructions.

No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree, nor, on the other hand, should he surrender any conscientious views founded on the evidence. It is the duty

of each juror to reason with his fellows concerning the facts, with an honest desire to arrive at the truth, and with a view of arriving at a verdict. It should be the object of all the jury to arrive at a common conclusion, and to that end to deliberate with calmness.

In conformity with the law, I have prepared two forms of verdict which you will take with you to your jury-room, and, when you shall have unanimously agreed upon a verdict, you will sign, by your foreman, that form upon which you have so agreed, and return the same into court as your verdict, and destroy the other form. [124]

The forms are;

1. Guilty as charged in the indictment.
2. Not guilty.

I now hand you the written instructions which I have just read to you, for your guidance, together with the indictment in the case, both of which you will return into court with your verdict.

Given at Fairbanks, Alaska, March 24th, 1916.

CHARLES E. BUNNELL,
District Judge.

That at the conclusion of the reading by the Court of the foregoing instructions to the jury, and before the jury retired to deliberate upon their verdict, the defendant, in the presence of the jury, in open court, took the following exceptions: [125]

Defendant's Exceptions to Instructions to Jury.

The defendant excepts to the refusal of the Court to give instruction Number 1 as prepared, proposed

and requested by the defendant, which exception is allowed by the Court.

The defendant excepts to the refusal of the Court to give instruction Number 2 as prepared, proposed and requested by the defendant, which exception is allowed by the Court.

Defendant excepts to instruction Number 20 given by the Court, for the reason that the same is involved, is not a fair and clear statement of the law, and does not state the law; which exception is allowed by the Court.

Defendant excepts to instruction Number 23 given by the Court, for the reason that the same is involved, is not a fair and clear statement of the law, and does not state the law; which exception is allowed by the Court.

Defendant excepts to instruction Number 24 given by the Court, for the reason that the same is involved, is not a fair and clear statement of the law, and does not state the law, which exception is allowed by the Court. [126]

Defendant excepts to instruction Number 25 given by the Court, for the reason that the same is involved, is not a fair and clear statement of the law, and does not state the law; which exception is allowed by the Court.

Defendant excepts to the instructions as a whole, because the said instructions are misleading, incomplete, involved, and do not state the law; which exception is allowed by the Court. [127]

Instructions Requested by Defendant.

INSTRUCTION NO. 2, REQUESTED BY DEFENDANT.

The jury are instructed that evidence has been introduced on the part of the prosecution for the purpose of proving that at other times prior to June 25th, 1916, the time of the alleged offense upon which they rely for a conviction, the defendant had sexual intercourse with the witness Grace Carey, and the jury are further instructed that you cannot convict upon any of these previous offenses, although you may believe beyond a reasonable doubt that they occurred as testified to by the witness Grace Carey, for the reason that the defendant is not upon trial for those offenses, or any of them; and the only purpose for which you can consider such evidence, if you believe the same to be true, is upon the question of the design or intent of the defendant and as bearing upon the likelihood or probability of the defendant having committed the offense charged in the indictment, and for no other purpose. [128]

[Caption and Title.]

Motion in Arrest of Judgment.

Comes now the defendant above named, and moves the Court for an order that no judgment be rendered against the defendant herein upon the verdict of guilty returned by the jury against him upon the 25th day of March, 1916, notwithstanding said verdict,

upon the ground and for the reason that the indictment herein does not state facts sufficient to constitute a crime, as is more fully and particularly set forth in the demurrer to said indictment filed herein, to which reference is hereby made and made a part of this motion.

LEROY TOZIER,
Attorney for Defendant.

Service of the foregoing motion admitted and a true copy thereof received this, 27th day of March, 1916.

R. F. ROTH,
U. S. Attorney. [129]

[Caption and Title.]

Motion for a New Trial.

Comes now the defendant in the above-entitled action and moves the Court to set aside the verdict of "Guilty" rendered herein against the defendant, upon the 25th day of March, 1916, and grant a new trial herein for the following reasons:

I.

Misconduct of the United States Attorney in his address to the jury in this case by using the following language:

> "You noticed that I challenged the statement of Mr. Tozier that Grace Carey testified that the last time that she was at the Callahan house was on the 25th day of June. I made that challenge of those statements, because my understanding was that she testified that that was the last time she had sexual intercourse with Dan

Callahan, and I have not any doubt at all but that is what was intended, because there is no doubt but what Grace Carey had been to Callahan's house many times since. That is an immaterial matter. There is no doubt but what she had been there many times since. And if I had understood that statement, why, of course, I would have had that corrected by testimony, because, if she had been there later—"

For the reason that the language of the prosecuting attorney above quoted, is improper in any criminal case; not based upon any evidence or reasonably deducible therefrom, and is calculated to inflame and prejudice the minds of the jury, and by reason of the said language on the part of the said prosecuting attorney, the defendant was prevented from having a fair trial. [130]

II.

Error of the Court at the trial and excepted to by the defendant in the admission of evidence, to wit:

For the error of the Court in overruling the objection of the defendant to the admission of the testimony of Laura Herrington; for the reason that the same was incompetent, immaterial and wholly inadmissible for any purpose or upon any correct theory applicable to this case, and was purely hearsay, and not binding upon this defendant; and to which overruling of the defendant's objection the defendant duly excepted.

III.

For error of the Court in overruling defendant's objection to the admission of the testimony of the witness Laura Herrington as to a conversation be-

tween the witness Grace Carey and the witness Laura Herrington, and particularly statements made by said Grace Carey to said Laura Herrington immediately after the alleged commission of the alleged offense, regarding where she, said Grace Carey, had been and certain money, to wit, the sum of three dollars she then had, and as to when and how she obtained the same; because said conversation and said statements were hearsay and not binding upon this defendant. To the admission of which testimony the defendant objected; which objection was overruled, to which the defendant duly excepted, as will more fully appear by the official stenographer's notes and record of the testimony of the said Laura Herrington.

IV.

For the error of the Court in his ruling upon the motion of defendant to strike out all the testimony of the witness Laura Herrington in this case; which motion was duly made by the defendant and overruled by the Court, and to which ruling the defendant then and there excepted. [131]

V.

For the error of the Court in refusing to read and give to the jury instructions Nos. One and Two, prepared and requested by the defendant, to be given by the Court in its charge to the jury; to which refusal the defendant duly excepted; which exceptions were allowed by the Court.

VI.

For error of the Court in giving and reading to the jury instructions Nos. 20, 23, 24 and 25 of the Court's

charge to the jury, for the reasons set out in defendant's exceptions to said instructions, which exceptions to said instructions were allowed by the Court.

VII.

Insufficiency of the evidence to justify the verdict of guilty, and because said verdict is against the law.

VIII.

For the reason that because of said errors of law occurring at the trial and excepted to by the defendant, and which more fully appears in the shorthand notes taken at the trial, the defendant herein was prevented from having a fair and impartial trial.

LEROY TOZIER,
Attorney for Defendant.

Service of the foregoing motion for a new trial admitted and a true copy thereof received this 27th day of March, 1916.

R. F. ROTH,
U. S. Attorney. [132]

[Caption and Title.]

Order Allowing and Certifying Bill of Exceptions.

United States of America,
Territory of Alaska,—ss.

I, the undersigned, presiding Judge at the trial of the above-entitled action, do hereby certify that the above and foregoing contains a full, true and accurate transcript of all the testimony adduced and heard at the trial thereof on the issues joined, with the objections and exceptions of said defendant to the reception and rejection of evidence, the typewritten charge of the Court to the jury and the exceptions to

instructions to the jury taken by the defendant, the motions in arrest of judgment and for a new trial, and all other matters and things occurring thereat and not otherwise of record.

And I now sign and allow the same as and for a true and correct bill of exceptions of all matters contained therein, and order the same to be refiled by the clerk of this court, and when so filed, to be and become part of the record in this cause.

Dated at Fairbanks, Alaska, this 6th day of May, 1916.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 549. [133]
[Indorsed]: Filed May 6, 1916. [134]

[Caption and Title.]

Acknowledgment of Service.

Service of the foregoing bill of exceptions admitted and a true copy thereof received this, 1st day of May, 1916.

R. F. ROTH,
United States District Attorney. [135]

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 1, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy.

Refiled in the District Court, Territory of Alaska, 4th Div. May 6, 1916. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [136]

[Caption and Title.]

Order Allowing Defendant's Proposed Bill of Exceptions.

2:00 P. M.

Now, on this day, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government and Leroy Tozier, Esq., appearing in behalf of defendant and this being the time set for hearing on defendant's proposed Bill of Exceptions herein, and counsel for the Government having been duly served with a copy thereof, and making no objection thereto, said Bill of Exceptions is hereby allowed as proposed.

CHARLES E. BUNNELL,
District Judge. [137]

[Caption and Title.]

Petition for Writ of Error.

To the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the Honorable CHAS. E. BUNNELL, Judge of the District Court for the Territory of Alaska, Fourth Judicial Division.

Comes now Daniel Callahan, the defendant below and plaintiff in error, and complains that in the record and proceedings had in the said action, and also in the rendition of the sentence and judgment in the above-entitled action in the said District Court, at the February term, 1916 thereof, against the said defendant below and plaintiff in error, Daniel Cal-

lahan, on the 11th day of April, 1916, manifest error having happened to the great damage of the said defendant below and plaintiff in error, whereof the said defendant below and plaintiff in error prays the Honorable Judges for the allowance of a writ of error, and for an order fixing the amount of bond to cover costs and damages in the said action, and for such other orders and processes as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated May 6, 1916.

LEROY TOZIER,

Attorney for Defendant Below and Plaintiff in Error.

Allowed:

CHARLES E. BUNNELL,

Judge.

[Endorsed]: Filed May 6, 1916. [138]

[Caption and Title.]

Order Allowing Petition for Writ of Error.

Now, on this day, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government, and Leroy Tozier, Esq., appearing in behalf of the defendant, and defendant having filed petition for writ of error in this cause, said petition is hereby allowed by the Court.

CHARLES E. BUNNELL,

District Judge. [139]

[Caption and Title.]

Assignment of Errors on Writ of Error.

The defendant below and plaintiff in error, in this action, in connection with his petition for writ of error, makes the following assignment of errors which he avers occurred upon trial of the action, to wit:

I.

The Court erred in denying the motion of defendant to set aside the order made by the Court on Wednesday, March 22d, 1916, at 10 o'clock A. M., that the defendant be allowed an open trial, to the denial of which motion the defendant duly excepted and the exception was allowed; for the reason that by virtue of said order the defendant was denied and did not have, a fair trial.

II.

The Court erred in denying the application of defendant for permission to further examine the juror Patton, made by the defendant at the hour of 2 P. M., March 23d, 1916, after the jury had been sworn to try the case, which application occurred as follows:

Mr. TOZIER.—I would like permission to further examine juror Patton—a few questions is all.

Mr. ROTH.—We object, because he has already been sworn to try the case.

Mr. TOZIER.—It is a matter that comes to my knowledge since 12 o'clock—since the recess.

Mr. ROTH.—The other jurors have been excused and it is a little late. [140]

The COURT.—A juror may be examined any time as to his general qualifications. If you desire to examine him in the matter of his citizenship, or something of that kind—

Mr. TOZIER.—That is not it, your Honor. That is not the matter I want to examine him about.

Mr. ROTH.—We object to it now, because the rest of the venire is excused and the jury is sworn to try the case.

(Objection sustained. Defendant excepts and is allowed an exception.)

For the reason that further examination of a juror upon matters coming to the knowledge of defendant or his counsel, touching the qualifications of the juror, after the juror has been sworn to try the case, and particularly before evidence is introduced, is not a matter solely in the discretion of the Court but a substantial right of the defendant.

To the denial of which said application the defendant duly excepted and exception was allowed by the Court.

III.

The Court erred in overruling the objection of defendant, made at the beginning of the testimony of Grace Carey, to the introduction of any evidence in this case; which objection was duly made by the defendant, overruled by the Court and exception thereto allowed by the Court.

IV.

The Court erred in admitting the evidence of the witness Laura Herington, and particularly that part

of the said witness Laura Herington which is as follows:

Q. Just tell what occurred between you and Grace at that time.

(Defendant objects as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the facts in this case. Objection overruled, and defendant asks and is given an exception.) [141]

Q. Go ahead now and state what was said and occurred between you and Grace at that time.

A. She showed me the money he gave her.

(Defendant moves to strike answer, plaintiff consents, and the Court strikes out the answer.)

Q. Just state what Grace said to you, and what was done.

(Defendant objects, unless it is shown more clearly that it has a bearing upon the actions of this defendant and the witness Grace Carey who was formerly upon the stand; and in any event it would only be hearsay, and not binding upon the defendant; that it is not corroborating evidence. Objection overruled, and defendant asks and is given an exception.)

Q. Go ahead.

A. She told me she did something with Dan to get the money.

(Defendant moves to strike answer. Motion denied and defendant asks and is given an exception.)

Q. What money are you referring to?

A. The money he gave her.

(Defendant objects to the answer and moves that it be stricken. Motion denied, and defendant asks and is given an exception.)

Q. What did she show to you? Did she show you anything there?

(Defendant objects as leading and suggestive. Objection overruled. Defendant excepts. Exception allowed.)

Q. Answer the question: Did she show you anything? A. Yes.

Q. What did she show you?

(Defendant makes the same objection. Objection overruled. Defendant asks and is given an exception.)

A. Three dollars.

Q. What did she say to you—the exact words that she said to you when she showed you the three dollars?

(Defendant objects as incompetent, irrelevant and immaterial. Objection overruled, and defendant asks and is given an exception.)

Q. Now, state the exact words she said to you. [142]

(Defendant makes same objection; same ruling and exception allowed.)

A. She said he did something to her.

Q. Is that what she said. Is that the exact language she used? A. No.

Q. I want the exact language she used.

(Same objection by defendant; same ruling and exception.)

Q. State the exact language she used.

A. She said that Dan had pushed her.

(Defendant objects and moves to strike answer. Objection overruled, motion denied and an exception allowed.)

Q. Did you ever have a conversation with Dan Callahan, the defendant in this case, in his house, about Grace Carey? A. Yes.

(Defendant objects for the further reason that it does not tend to prove any of the facts at issue in this case or disprove them. Objection overruled and defendant asks and is given an exception.)

Q. When was that? How old were you when that conversation took place?

A. Twelve years old.

Q. Just tell this jury what Dan Callahan said to you at that time about Grace Carey?

A. He said he did that to Grace and that she was not afraid.

(Defendant moves to strike the answer as not responsive to the question. Motion denied, and defendant asks and is given an exception.)

V.

The Court erred in sustaining the objection of plaintiff to the cross-examination of the witness Laura Herington, and particularly that part of said cross-examination which is as follows:

Q. You and Grace have talked this thing over quite a number of times, haven't you, Laura?

A. Yes. [143]

Q. Talked it over as to what you were going to testify to here and as to what she was going to testify to? A. Yes.

Q. You have talked it over with Mr. Roth too, haven't you? A. Yes.

Q. And you girls also talked over about the money you were going to get for coming here, witness fees and such as that? A. Yes.

Q. That you were getting a nice thing out of these cases. You and Grace had that talk together?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection sustained. Defendant excepts, and asks and is given an exception.)

VI.

The Court erred in denying the motion of defendant, made at the close of the Government's case, to strike out the evidence of the witness Laura Herington, which is as follows:

Mr. TOZIER.—The defendant now moves that the evidence of the witness Laura Herington, in so far as the same relates to any conversation she may have had with the witness Grace Carey, testified as having occurred on the 25th day of June, 1915, regarding the relation or relations of the witness Grace Carey with this defendant, Daniel Callahan, as having occurred on the said 25th day of June, and in particular that part of the conversation occurring between the witness Laura Herington and the witness Grace Carey wherein the witness Laura Herington testified that Grace Carey showed her, Laura Herington, three dollars and made the remark that she had received the three dollars from this defendant, Dan Callahan, and that she said Dan

Callahan had pushed her, should be stricken from the record and the jury instructed to disregard said testimony, for the reason that the same is mere gossip, hearsay and could have no bearing upon this case, and serves to prejudice the rights of the defendant, [144] Dan Callahan, in this case.

(Motion denied. Defendant asks and is given an exception.)

VII.

The Court erred in sustaining the objection of the plaintiff to the introduction of the following testimony of the witness and defendant, Daniel Callahan, as follows:

Q. Mr. Callahan, do you think of anything else that you want to testify to at this time that I have not asked you about?

Mr. ROTH.—That is objected to—(Interrupted).

Mr. TOZIER.—Just a moment. (Continuing)—that appeared in the testimony of any of the witnesses that appeared upon the stand here yesterday?

(Plaintiff objects as irrelevant, incompetent and immaterial, too indefinite. Objection sustained and the Court states that Mr. Tozier may examine the testimony and see if he desires to ask any questions. Defendant asks and is allowed an exception.)

VIII.

The Court erred in reading and giving to the jury instruction numbered 23, as follows:

"You are instructed that if you believe, beyond a reasonable doubt, that the witness Grace Carey told the witness Laura Herington of the act of sexual intercourse alleged to have been committed upon the said Grace Carey by the defendant, and that said Laura Herington was the first person she met after said alleged act, and that it was the said Grace Carey's first opportunity to tell any person, and that said statement was made immediately after leaving defendant's house after said alleged act of sexual intercourse was completed, then that may be considered by you as a corroborating circumstance tending to sustain the truth of the statement of the said Grace Carey as to what had just transpired between her and the defendant."

To which instruction the defendant duly excepted and the exception was allowed by the Court.

IX.

The Court erred in reading and giving to the jury instruction numbered 24, as follows:

You are instructed that in the case of rape it is not essential that the one upon whom the rape is alleged to have been committed should be corroborated by the testimony of other witnesses as to the particular act constituting the offense; and if the jury believe, beyond a reasonable doubt, from the testimony of the witness, Grace [145] Carey, that the corroborating circumstances and facts testified to by other witnesses, that the defendant did commit the crime as charged, the law would not require that the wit-

ness Grace Carey should be corroborated by other witnesses as to what transpired at the immediate time and place when it is alleged the crime was committed."

To which instruction the defendant duly excepted and the exception was allowed by the Court.

X.

The Court erred in giving and reading to the jury instruction numbered 25, as follows:

"You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Daniel Callahan, being then and there over the age of twenty-one years, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 25th day of June, 1915, did have carnal knowledge of Grace Carey and did penetrate the female organ of Grace Carey with his male member or penis, and the said Grace Carey was then and there a female under the age of sixteen years, and was not then and there the wife of said defendant, Daniel Callahan, you will find the defendant guilty of the crime of rape, as charged in the indictment."

To wrich instruction the defendant duly excepted and the exception was allowed by the Court.

XI.

The Court erred in refusing to give instruction numbered —— prepared and requested by the defendant to be given to the jury, as follows:

"The jury are instructed that evidence has been introduced on the part of the prosecu-

tion for the purpose of proving that at other times prior to the 25th day of June, 1915, the time of the alleged offense upon which they rely for a conviction, the defendant had sexual intercourse with the witness, Grace Carey, and the jury are further instructed that you cannot conflict upon any of these previous offenses, although you may believe beyond a reasonable doubt that they occurred as testified to by the witness Grace Carey, for the reason that the defendant is not upon trial for those offenses, or any of them, and the only purpose for which you can consider such evidence, if you believe the same to be true, is upon the question of the design or intent of the defendant and as bearing upon the likelihood or probability of the defendant having committed the offense charged in the indictment, and for no other purpose."

XII.

The Court erred in denying the motion of the defendant in arrest of judgment; to which denial the defendant duly excepted **[146]** and the exception was allowed by the Court.

XIII.

The Court erred in denying the motion for a new trial, duly made by the defendant, to which denial the defendant excepted and the exception was allowed by the Court.

XIV.

The Court erred in pronouncing sentence and rendering judgment against the defendant.

WHEREFORE, defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

LEROY TOZIER,
Attorney for Defendant.

Service admitted and true copy received this 6th day of May, 1916.

R. F. ROTH,
United States District Attorney.

[Endorsed]: Filed May 6, 1916. **[147]**

[Caption and Title.]

Writ of Error.

The President of the United States, to the Honorable, the Judge of the District Court for the Territory of Alaska, Fourth Judicial Division, GREETING:

Because in the records and proceedings, as also in the rendition of the sentence and judgment of a plea which is in said District Court before you, between the United States of America, plaintiff and Daniel Callahan, defendant and plaintiff in error, as by his complaint appears.

We, being willing that said error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial

Circuit together with this writ so that you have the same at the City of San Francisco, in the State of California, on the 5th day of June, 1916, in the said Circuit Court of Appeals to be then and there heard, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done thereof to correct that error, what of right and according to law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of **[148]** the Supreme Court of the United States, of America, this 6th day of May, 1916.

[Seal] J. E. CLARK,

Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division.

Allowed:

CHARLES E. BUNNELL,
District Judge. **[149]**

[Caption and Title.]

Order Allowing Writ of Error.

Now, on this day, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government, and Leroy Tozier, Esq., appearing in behalf of the defendant and defendant's petition for writ of error herein having been allowed by the Court, said writ of error in this cause, entitled In the United States Circuit Court for the Ninth Circuit was made and allowed by the Court.

CHARLES E. BUNNELL,
District Judge. **[150]**

[Caption and Title.]

Order Permitting Withdrawal of Motion for Order Allowing Supersedeas Bond.

Now, on this day, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government and Leroy Tozier, Esq., appearing in behalf of the defendant, and defendant having filed a motion for order allowing supersedeas bond herein, now requests permission of the Court to withdraw said motion, and there being no objections,

It is ordered that said motion may be withdrawn.

CHARLES E. BUNNELL,
District Judge.

Clerk's Note: The above order should have been entered before Order Allowing Defendant's Proposed Bill of Exceptions entered on page 549. **[151]**

[Caption and Title.]

Order Denying Motion for Order Allowing Supersedeas and Fixing Amount of Bond.

Now, on this day, Harry E. Pratt, Assistant United States Attorney, appearing in behalf of the Government and Leroy Tozier, Esq., appearing in behalf of the defendant, and defendant now filing a motion in this cause for order allowing supersedeas and fixing amount of bond, and the Court having considered said motion,

It is ordered that said motion be, and the same is, hereby denied.

CLERK'S NOTE: Defendant notes an exception to above ruling, which exception is allowed.

CHARLES E. BUNNELL,
District Judge. **[152]**

[Caption and Title.]

Citation on Writ of Error.

To R. F. ROTH, United States District Attorney, District of Alaska, Fourth Judicial Division, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED on behalf of the plaintiff in error, Daniel Callahan, to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden in the City of San Francisco, in the State of California, on the 5th day of June, 1916, pursuant to a writ of error filed in the Clerk's office of the District Court for the Territory of Alaska, Fourth Judicial Division, wherein Daniel Callahan is plaintiff in error and the United States of America is defendant in error, to show cause, of any there be why the sentence and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

Dated and done in open Court this 6th day of May, 1916.

[Seal] CHARLES E. BUNNELL,
District Judge.

Service of the above Citation, by receipt of a true

copy thereof, is hereby admitted this 6th day of June, 1916.

R. F. ROTH,
U. S. District Attorney **[153]**

[Caption and Title.]

Motion for Order Extending Time to File Record and Docket Cause in Appellate Court.

Comes now the above-named plaintiff in error, Daniel Callahan, by his attorney, Leroy Tozier, and moves the Court for an order enlarging and extending the time within which the transcript in the above-entitled case should be filed in the above-entitled court, at San Francisco, California, until the 31st day of August, 1916, for the reason that the transmission of mail matter between Fairbanks, Alaska, and San Francisco, aforesaid, is subject to great delay and uncertainty.

Dated, May 13, 1916.

LEROY TOZIER,
Attorney for Plaintiff in Error.

Service admitted May 13, 1916.

R. F. ROTH,
United States District Attorney.

[Indorsed]: Filed May 13, 1916. **[154]**

[Caption and Title.]

Order Extending Time to File Record and Docket Cause to August 31, 1916.

This matter coming regularly on to be heard upon the application of Daniel Callahan, the above-

named plaintiff in error, for an order extending the time within which the transcript in this case should be filed in the said United States Circuit Court of Appeals, at San Francisco, California, such extension being based upon the delays and uncertainties of the transmission of mail matter between Fairbanks, Alaska, and San Francisco, California, said plaintiff in error being represented by Leroy Tozier, his attorney, and said defendant in error being represented by R. F. Roth, United States District Attorney, the Court being advised in the premises,—

IT IS ORDERED that the time within which the transcript in this case should be filed in the United States *Circuit of* Appeals, at San Francisco, California, be and the same is hereby enlarged and extended to August 31, 1916.

Done in open court this 13th day of May, 1916.

CHARLES E. BUNNELL,

Judge of the District Court for Alaska, Fourth Judicial Division.

Service admitted May 13th, 1916.

R. F. ROTH,

United States District Attorney for Alaska, Fourth Judicial Division.

Entered in Court Journal No. 13, page 559. **[155]**

[Caption and Title.]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, J. E. Clark, Clerk of the United States District Court, Territory of Alaska, Fourth Division, do

hereby certify that the foregoing consisting of one hundred and fifty-five pages, numbered from 1 to 155, inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 713–Criminal, entitled, United States of America, Plaintiff, vs. Daniel Callahan, Defendant, wherein Daniel Callahan is plaintiff in error, and the United States of America is defendant in error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action and made a part of this transcript and by virtue of the citation issued in said cause and is the return thereof in accordance therewith.

And I do further certify that the index thereof, consisting of pages 1 to 3, is a correct index of said transcript on writ of error; also that the costs of preparing said transcript and this certificate, amounting to Fifty-seven and 80/100 ($57.80) Dollars, has been paid to me by counsel for plaintiff in error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this fifth day of August, 1916.

[Seal] J. E. CLARK,
Clerk of the District Court, Territory of Alaska, 4th Div.

By Sidney Stewart,
Deputy Clerk.

[Endorsed]: No. 2845. United States Circuit Court of Appeals for the Ninth Circuit. Daniel Callahan, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed August 22, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

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No. 2845

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES J. HEGGERTY,
THOMAS A. McGOWAN,
JOHN A. CLARK,
LEROY TOZIER,
Attorneys for Plaintiff in Error.

Filed this.....day of December, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2845

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The Case.

The defendant in error was accused in an indictment by the grand jury, at Fairbanks, Alaska, charging:

> "That said Daniel Callahan on June 25, 1915, at Fairbanks * * * did then and there wilfully, unlawfully, and feloniously, carnally know and abuse one *Grace Carey,* a female child, under the age of 16 years, to wit: of the age of 14 years * * *" (Tr. 3).

The plaintiff in error pleaded "not guilty", and the trial to the jury took place March 22, 1916 (Tr. 35); the jury rendered a verdict finding him guilty of the crime of rape on March 25, 1916 (Tr. 23); he moved for a new trial and in arrest of

judgment which motions were denied (Tr. 24-28); on April 11, 1916, judgment was rendered and he was sentenced to the United States penitentiary for *twelve years* (Tr. 31-33); to reverse this judgment this writ was sued out.

Argument.

I.

The indictment is *not* sufficient to charge the crime of constructive rape, under Section 1894, Compiled Laws of Alaska, because the carnal knowing is not alleged to have been *"with her consent"*. Section 1894 reads:

> "That whoever has carnal knowledge of a female person, forcibly and against her will, *or,* being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, *with her consent,* is guilty of rape."

The indictment omits to charge that the carnal knowing and abuse were *"with her consent",* as Section 1894 expressly states; the defendant moved to set aside and demurred to the indictment (Tr. 7-11); the Court overruled the motion and demurrer.

Until the case of the Government was all in evidence, it was impossible for defendant or his counsel to know whether the Government would prove a *forcible* ravishment or carnal intercourse *"with her consent",* and the rules of evidence vary

the proof in the two cases, in *forcible* ravishment, the *"outcry"* and *"recent complaint"*, in carnal knowledge with her consent, there is no "recent complaint", but mere hearsay, gossip, tattle or brag of what she and he had willingly done; and the defendant would have difficulty knowing what case he would have to prepare to defend against.

State v. Carl, 71 Ohio St. 259, 266;
s. c., 73 N. E. St. 259, 266;
State v. Hensley, 75 Ohio St. 255, 267;
Hubert v. State, 104 N. W. 276;
State v. Lee Yan, 10 Pac. 365;
State v. Daly, 18 Pac. 357;
State v. Birchand, 59 Pac. 468, 471;
State v. Haskinson, 96 Pac. 138;
People v. Wilmot, 72 Pac. 838;
State v. Giffin, 86 Pac. 951, 954.

The charge might even be *"fornication"*, under Section 318 Federal Criminal Code, and it even might be *"incest"*.

1 Wigmore on Ev., Sec. 402 (3);
State v. White, 25 Pac. 93.

The indictment was therefore insufficient under the law, and the conviction and judgment cannot be sustained.

II.

The Court *denied* defendant *a public trial* of his case, in violation of Article VI of the Amendments to the Constitution of the United States, providing:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial* * * *."

The record here shows:

> "On the Court's own motion, the Court ordered that *all* persons *of the general public,* not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling counsel for the defendant notes an exception, which exception was allowed" (Tr. 124).

The defendant requested the Court to change this order and allow an open trial. The Court refused and defendant again excepted (Tr. 35). And the defendant assigns error in this ruling (Tr. 124).

In Reagan v. U. S., 202 Fed. 488, this Court very clearly distinguished the power of the Court to exclude some part of the general public, where it appeared from the record that *the reasons* the Court had for such exclusion were given and seemed sufficient, and there was no showing by the defendant of any injury therefrom.

But in *this* case, the Court gave *no reason* for the exclusion of the general public; and from the character of the prosecutrix, *Grace Carey,* and her so-called corroborating witness, *Laura Herrington,* as appearing from *this* record, and taking judicial notice of the *same* Grace Carey and the *same* Laura Herrington as they appear before Your

Honors in the cases now under submission before you, viz: Wooldridge v. U. S., No. 2839 (which you have already decided and *reversed*), the *same* Laura Herrington is prosecutrix (Tr. p. 75), and Rose v. U. S., No. 2819, the *same* Grace Carey is prosecutrix (Tr. 34); and the remarkable resemblance of the testimony in *this* case and that in the other *two* cases before you, we believe that justice to the defendant here, sentenced to *twelve years* imprisonment, urges a reconsideration of *this* point by Your Honors, as we feel satisfied it is materially different and distinguishable from the case before you in Reagan v. U. S., 202 Fed. 488, where the trial Court there had sufficient reasons and expressly stated its reasons for excluding the morbidly curious, etc., portion of the general public from the trial, while in *this* case the Court neither stated nor does the record show there existed any reason for the order of exclusion, and especially because in this case defendant's counsel specially requested the Court to set aside its order excluding the public and asked that the Court grant defendant a public trial (Tr. 35).

There seems to be no possible doubt but that this case was trumped up, that Grace Carey and Laura Herrington were *decoys* and they, with others (as appears from the other two cases before you), were playing the *"badger game"* on defendant, and that the crime and acts charged against defendant were never committed by him.

III.

The Court admitted the evidence of this same *Laura Herrington,* over the *repeated objections and exceptions* of the defendant as follows:

She had testified without objection that she was then *fourteen* years old, that she was acquainted with the defendant and that she saw Grace Carey (no date being stated by the witness, the rape being charged in the indictment as occurring *on* June 25, 1915, Tr. 3) coming from Callahan's house (Tr. 43), and was then asked:

> "Q. Just tell what occurred between you and Grace at that time (Tr. 43). Just state what Grace said to you, and what was done.
> A. She *told* me that she did something with Dan to get the money. (Motion to strike out denied and exception; Tr. 44.)
> Q. What money are you referring to?
> A. The money he gave her. (Objection and motion to strike out, both overruled; Tr. 44.)
> Q. What did she show you? Did she show you anything there? (Objection and exception.)
> A. Yes.
> Q. What did she show you? (Objection and exception; Tr. 45.)
> A. Three dollars.
> Q. What did she say to you, the exact words that she said, when she showed you the three dollars. (Objection and exception; Tr. 45.)
> A. She said he did something to her. That Dan had pushed her."

We respectfully submit, that this evidence of Laura Herrington as to what Grace Carey *told*

her is not "recent complaint", but mere narrative, gossip and tattle, the purest kind of *hearsay;* and its injurious and prejudicial effect is obvious.

In ordinary cases of rape, and the same rule obtains in constructive rape, it is permitted that third persons might testify to *the complaint* of her abuse, where recently made; but this is not evidence *of complaint,* but on the contrary a mere narrative by Grace Carey to her chum Laura Herrington of a pleasurable occurrence entirely to her satisfaction; and not of an abuse, injury or insult perpetrated upon her; *"a casual conversation",* as said by the Court in People v. Wilmot, 139 Cal. 103, 106.

In People v. Wilmot, 139 Cal. 103, 105-108, the Court, by Chief Justice Angellotti, very fully and carefully considered and stated the injurious and inadmissable character of very similar evidence; and we therefore quote from that case.

> People v. Wilmot, 139 Cal. 103.
>
> "Numerous errors in the rulings of the court in the admission and rejection of testimony are alleged, the *main question* raised thereby being as to the *admission* by the court of evidence *of statements of the prosecutrix to others* as to the commission of the offense charged. It is well settled that in prosecutions for rape the people may prove that the injured party made complaint of the injury while it is recent, and that this may be shown both by the prosecutrix and those to whom the complaint is made. While such evidence would ordinarily be hearsay, its admission in this class of cases is justified upon the ground that in such cases, *when*

restricted to the fact of complaint, it is in the strictest sense original evidence. It is natural that a woman violently assaulted and outraged should, at the earliest moment practicable, make complaint of her injury, and her omission to do so, especially to those related to her, would be regarded as strong evidence against her claim that she was an unwilling victim. Hence the fact that she did immediately make complaint has generally been held to be original evidence, corroborating her testimony that the act of the defendant was against her will. The *reason for the rule* admitting such testimony would appear to be *wanting* in the case where the act is accomplished *with a female who fully understands* the nature thereof, and freely and voluntarily submits thereto. Doubtless, however, evidence of the fact of complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and non-consent were conclusively inferred by the law. (See People vs. Baldwin, 117 Cal. 251; People vs. Barney, 114 Cal. 554.) The *rule* enunciated *by the authorities generally,* and by *all* the decisions in this state, is in all cases to admit evidence of the fact of complaint, and *in no case to admit anything more.* (People vs. Mayes, 66 Cal. 597; People vs. Tierney, 67 Cal. 55; People vs. Snyder, 75 Cal. 323; People vs. Stewart, 97 Cal. 241; People vs. Barney, 114 Cal. 554; People vs. Baldwin, 117 Cal. 251; People vs. Lambert, 120 Cal. 171.) For, as said by Greenleaf: 'The evidence when *restricted* to this extent is not hearsay, but in the strictest sense original evidence. *When,* however, these limits are *exceeded, it becomes hearsay in a very objectionable form.*' It is clear to allow any mere statement of the prosecutrix as to

the details of the affair, or as to the name of the person accused by her, to be given in evidence *would be to allow hearsay evidence to prove the offense.* (See People vs. Lambert, 120 Cal. 171.) It is likewise *clear* that any mere *statement of the prosecutrix, made in casual conversation with her friends, does not constitute the complaint* impelled by physical pain or outraged feelings contemplated by the rule.

"The record in this case shows that the prosecutrix was asked, after having testified to the circumstances of the affair, 'Did you ever tell this to anybody?' and answered over objection and exception, 'I told it to Alice Fiese.' Alice was a playmate of prosecutrix, and prosecutrix seemed to have communicated the information to her as a mere matter of gossip. There was no complaint apparent. She was then asked, 'Anybody else?' and answered over objection and exception, 'I told it to Miss Fannie Wyatt.' She stated that she also told others. Miss Wyatt, who was a kindergarten teacher, was subsequently called, and stated that about six days after the date of the alleged offense she had a conversation with the prosecutrix. She was then asked by the district attorney whether at that time anything was said by the prosecutrix on the subject of her relations with the defendant, and answered, 'Yes, sir.' It is doubtful from the record whether the objection to this question made by defendant was made before or after answer. The answer was followed by a further question on the part of the district attorney, as follows: 'Did she say whether or not this defendant had had sexual intercourse with her?' This was objected to by defendant, whereupon the following occurred:

"The COURT. The rule in such case is, that particular statements of the parties are not

admissible on the part of the prosecutrix, but the fact that the fact of an assault was communicated to another is always admissible.

"DISTRICT ATTORNEY. That is all I ask for.

"The COURT. The form of your question goes further than that. Answer this last question.

"Exception taken by defendant's counsel.

"WITNESS. She did speak about it.

"Q. About five days after? A. Yes, sir.

"Q. Did she say that *he* had?

"A. She *did say* that *he* had on the 9th day of May.

"The answer of the learned attorney-general to the claim of defendant, that this evidence was improperly admitted, is exceedingly technical, but it is probably the only answer available. That *the testimony* elicited *was incompetent* is very clear, and that it *must have substantially affected defendant's cause* is likewise clear. The attorney-general contends that the first question set forth was modified by the suggestion of the court and the answer of the district attorney, but it is plain that the court, over the objection of defendant, directed the witness to answer the question asked by the district attorney, and that she did answer it. The subsequent questions asked were along the same line as the first, for the purpose of obtaining the information sought to be elicited by such question, and under the circumstances shown by the record should be deemed covered by the objection and exception. Throughout the record it is apparent that the counsel for defendant objected to the admission of any testimony of statements by the prosecutrix to others, and sought diligently to exclude the same. Under the circumstances shown, we feel that *it would be trifling with justice to hold* that all of this testimony given by Miss Wyatt was not covered by the objection and exception of defendant.

> "As was said by this court, in People vs. Baldwin, 117 Cal. 251, '*in this class of prosecutions, the defendant,* owing to natural instincts and laudable sentiments on the part of the jury and the usual circumstances of isolation of the parties involved at the commission of the offense, *is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence that he should be given the full measure of every legal right'.*" (Italics ours.)

Also: State v. Sargent, 49 Pac. (Or.) 889, Judge Wolverton rendering the opinion.

Also:

> People v. Lambert, 120 Cal. 170, 172;
>
> People v. Mayes, 66 Cal. 597;
>
> People v. McGilver, 67 Cal. 55.

In Vol. 10, Encyclopaedia of Evidence, page 587, the rule is thus stated:

> "After the prosecutrix has testified to the commission of the outrage upon her, it is competent for the prosecution to prove in corroboration of her testimony as to the main fact, either by her or other witnesses that recently after the perpetration of the offense, she *made complaint* to those to whom complaint of such an occurrence would naturally be made, but on direct examination, such testimony is confined to the bare fact of complaint, and neither the details of the occurrence, nor the name of the offender, can be proved."

Citing *a multitude* of cases from nearly every Court in the Union.

IV.

The Court erred in allowing the prosecutrix *Grace Carey* to testify, over defendant's objection and exception:

> "Q. Tell the jury *who* was the *first* man that ever had sexual intercourse with you?
> A. Dan Callahan.
> Q. Where did that occur?
> A. Over to Dan Callahan's house.
> Q. Did he give you anything particular after that?
> A. Yes. He gave me twenty-five cents" (Tr. 41).

This evidence, as to "who was the *first* man that ever had sexual intercourse with her", did not in any manner fall under the rule admitting previous acts of a similar nature in order to show a disposition to commit the act in question.

She testified: "I was only about *nine* years old, about ten; either nine or ten" at that time (Tr. 41), and was consequently at least *five* years *before* the offense for which he was indicted.

Its effect, as proving her *seduction* by Callahan at that age—nine years, was necessarily highly injurious and prejudicial before the jury, and was not competent or relevant.

V.

There is *no evidence* in this record from *Grace Carey* even, that Dan Callahan ever *carnally knew* and abused her.

Nowhere does she testify *herself,* that Dan Callahan had *sexual intercourse* with her. She, Grace Carey, testified only that she *told* Laura Herrington that Dan Callahan "pushed her" (Tr. 40), and Laura Herrington said: "She said that Dan had *pushed her"* (Tr. 45); and we do not believe that this Court, in the absence of some evidence on the record, will take judicial notice that *"pushed her"* means that he had *"sexual intercourse"* with her.

On direct examination by the district attorney, Mr. Roth, Grace Carey said:

> "Then he had *full sexual intercourse,* and I got up and put my drawers back on and I went home" (Tr. 40).

On cross-examination she testified:

> "Q. Who *told* you to say that Dan Callahan had *full sexual intercourse* with you?
> A. *Mr. Roth told me the word;* that was all.
> Q. Mr. Roth told you the word?
> A. Yes, I asked him the word.
> Q. You asked him the word?
> A. Yes.
> Q. *When* did you ask him that?
> A. *Today.*
> Q. You never knew that term before?
> A. *I never knew that word, no"* (Tr. 40).

There is not a word of evidence in this case that Dan Callahan ever "carnally knew" and "abused" Grace Carey. The only testimony of *her own* is: "Well, I went in and I took my drawers off and I went on the bed and then Dan got on top of me" (Tr. 40).

In an ordinary *rape* case, there is not a Court in the land that has ever held that the crime of *rape* was committed, unless the *evidence* showed that the male *inserted his penis in* the female to some extent, however slight. Here defendant is charged with *rape,* and we respectfully submit, that there is not any evidence in this record *from Grace Carey* that Dan Callahan ever, to the slightest extent, *inserted* his penis in the sexual organ of Grace Carey.

In 33 Cyc. p. 1421, it is stated, with the authorities:

> "Carnal knowledge is also necessary, as a rule, under statutes punishing carnal abuse of female children. In such statute carnal 'abuse' means abuse of the sexual organ by intercourse or the attempt to have the same."
>
> Also People v. Howard, 143 Cal. 316.

The Court charged the jury on "penetration", although that word and the word "penis" also used in the charge, are not in the evidence (Tr. 132).

The law is clearly stated in 33 Cyc. p. 1422, citing a multitude of authorities (in fact there are none to the contrary), as follows:

> "There can be *no carnal* knowledge *without penetration.* Mere actual contact of the sexual organs is not sufficient. The slightest penetration, however, of the body of the female by the sexual organ of the male is sufficient."

Although the district attorney *told* her to say *"sexual intercourse"* (Tr. 42), and he later asked

her *three* questions (Tr. 40, 41) *containing* the words "sexual intercourse", she never used these words in any of her answers to these questions.

Just as clearly does this record *fail* to show that Dan Callahan ever sexually penetrated Grace Carey, as did the record in the *Wooldridge* case (just decided by this Court and *reversed*) fail, as you correctly held, to show any *overt act* of attempt to rape Laura Herrington, Grace Carey's chum. Grace Carey said:

> "I showed Laura Herrington the $3 Dan gave me, and told her what he gave it to me for. I told her that *he had pushed me* for it" (Tr. 407).

She did not say *what* she meant or understood by "pushed"; she did not say *what* she *understood* by "sexual intercourse", which the district attorney *told* her to say (Tr. 42); nor did she say what "sexual intercourse" was or meant, and as she had already stated *what Dan did,* viz: "Well, I went in and I took my drawers off and I went on the bed and then Dan got on top of me" (Tr. 40), that undoubtedly is what she referred to and meant, and as that action does not mean or show *penetration* it could not mean that.

The Court *charged* the jury (Tr. 111):

> "You are instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant Daniel Callahan, * * * *on* the 25th day of June, 1915, did have carnal knowledge of Grace Carey and *did penetrate the female organ of Grace*

> *Carey with his male member or penis,* * * * you will find the defendant guilty of the crime of rape as charged in the indictment" (Tr. 111; instruction 25).

Nowhere in this record, except in this instruction, can the word *"penetrate"* or the word *"penis",* be found; and we submit no words of Grace Carey contain these words; the words "sexual intercourse", the district attorney *told* Grace Carey to use and state in her evidence (Tr. 42).

VI.

The Court erred to the injury and prejudice of the defendant's case before the jury in permitting the witness *Laura Herrington* to testify, over the objection and exception of defendant:

> "Q. Did you ever have a conversation with Dan Callahan, in his house, about Grace Carey?
> A. Yes.
> Q. When was that? How old were you when that conversation took place?
> A. *Twelve* years old.
> Q. Just tell the jury what Dan Callahan said to you at that time about Grace Carey?
> A. He said he did that to Grace and that she was not afraid" (Tr. 45-46).

Laura Herrington testified she was *then fourteen* years old, at the time of the trial (Tr. 43). So that the statement of Callahan she testified to was *two* years *before* the trial; as she testified on

the trial she was *twelve* when Callahan made that statement to her (Tr. 46).

There is no rule of law under which this testimony was admissible against the defendant charged here with a crime alleged to have been committed in 1915, by evidence of something it is asserted he told Laura two years before.

VII.

The defendant is charged with rape on the person of Grace Carey, *committed on the twenty-fifth* day of June, 1915 (Tr. 3; instructions to jury, Tr. 101).

The Court instructed the jury that

> "nevertheless, where, as in this case, the prosecution by its evidence has elected to prove *an offense upon a certain day,* to wit: *the twenty-fifth* day of June, 1915, *they are bound to prove* to your satisfaction, beyond a reasonable doubt, that such *offense was committed* by the defendant *at the time* and place testified to by the witnesses in this case, and in the manner and form as charged in the indictment, *before you can find the defendant guilty*" (Tr. 112).

There is absolutely *no evidence* in this case that the asserted crime of rape was committed *on* June *twenty-fifth,* 1915; the *instruction* of the Court is *the law of the case,* and the evidence is therefore not sufficient to sustain the conviction.

Grace Carey, the prosecutrix, did *not* testify that Dan Callahan had sexual intercourse with

her on June *twenty-fifth*. She testified she went to Callahan's residence "About the latter part of June. Around there somewhere" (Tr. 38).

She said it was after the carnival; she did not know how long, just a few days (Tr. 39); but there is no evidence in the record of the *date when* the carnal knowing occurred.

Laura Herrington testified that she saw Grace Carey "the latter part of last June", that she could not fix the time; said "I don't remember"; that she saw her coming from (not out of) Dan Callahan's house (Tr. 43).

Joe Mack, in answer to a question by the district attorney putting the time and hour as a part of the question, thus:

> "Q. Where were you on the 25th of June, 1915, between 12 and 1 o'clock?
> A. I was in front of Mr. Healey's house, in the garden, watering the plants.
> Q. Now, where did Grace Carey go when you first saw her? How did she go?
> A. Well, she came walking up there towards—as far as Callahan's place, then she kind of stalled; then she came over to me and got some flowers. Some pansies. I gave them to her. She stalled around there.
> Q. *Where did she go after* she left there?
> A. I didn't see that—where she went to, because I went away" (Tr. 49).

So that there is no evidence in this record that the defendant Callahan had sexual intercourse with Grace Carey on June 25, 1915; and the evidence, under the instruction of the Court, which

is the law of the case for the jury, was absolutely insufficient to support the verdict of guilty against Callahan.

In conclusion, we respectfully submit that upon the evidence disclosed by this record, the defendant has been erroneously convicted of rape and sentenced to *twelve years* imprisonment; and that the judgment should be reversed and a new trial granted the defendant.

Dated, San Francisco,
December 15, 1916.

CHARLES J. HEGGERTY,
THOMAS A. MCGOWAN,
JOHN A. CLARK,
LEROY TOZIER,
Attorneys for Plaintiff in Error.

No. 2845

7

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

GOVERNMENT'S BRIEF

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Filed this.....day of January, 1917

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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United States Circuit Court of Appeals

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DANIEL CALLAHAN,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

GOVERNMENT'S BRIEF

Statement of Case

The indictment (p. 3 trans.) charges:

> "That said Daniel Callahan on the 25th day of June A. D. one thousand nine hundred and fifteen, at Fairbanks, in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and within the jurisdiction of this Court, did then and there willingly, unlawfully and feloniously carnally know and abuse one Grace Carey, a female child under the age of sixteen years, to-wit: of the age of fourteen years, he, the said Daniel Callahan, being then and there a male person over the age of twenty-one years, etc."

The defendant was given a jury trial and found * * * guilty of the crime of rape, as charged in

the indictment and sentenced to twelve years' imprisonment.

Argument

While the transcript in this case sets forth many assignments of error, a careful review of these assignments will show that most of them are trivial and without merit. In fact, counsel for plaintiff in error have ignored all but seven of said assignments of error and the Government now desires to direct attention to those assignments which counsel deem of sufficient importance to mention in their opening brief.

The assignments of error above referred to, and which plaintiff in error claims to be sufficiently prejudicial to justify a reversal, are as follows:

I.

That:

> "The indictment is *not* sufficient to charge the crime of constructive rape, under Section 1894, Compiled Laws of Alaska, because the carnal knowing is not alleged to have been *'with her consent'.*"

II.

That:

> "The Court denied defendant a public trial of his case, in violation of Article VI of the Amendments of the Constitution of the United States, providing:
>
> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *'."

The record, as set forth in the transcript, shows that:

> "On the Court's own motion, the Court ordered that all persons of the general public, not properly having business before the Court, be excluded from the courtroom during the trial of this cause, to which ruling counsel for the defendant notes an exception, which exception was allowed."

III.

That the Court erred in admitting the evidence of Laura Herrington to the effect that shortly after the occurrence of the alleged crime, she had a conversation with the complaining witness, Grace Carey, and that Grace Carey showed her three dollars, which plaintiff in error had given her, and that Grace Carey said that "Dan (defendant) had pushed her."

IV.

That the Court erred in allowing the prosecutrix Grace Carey to testify as follows:

> "Q. Tell the jury who was the first man that ever had sexual intercourse with you?
>
> A. Dan Callahan.
>
> Q. Where did that occur?
>
> A. Over to Dan Callahan's house.
>
> Q. Did he give you anything particular after that?
>
> A. Yes, he gave me twenty-five cents."

V.

That there is no evidence in this record from Grace Carey that Dan Callahan ever carnally knew and abused the prosecuting witness, Grace Carey.

VI.

That the Court erred in permitting the witness Laura Herrington to give the following answers to the following questions:

"Q. Did you ever have a conversation with Dan Callahan, in his house, about Grace Carey?

A. Yes.

Q. When was that? How old were you when that conversation took place?

A. Twelve years old.

Q. Just tell the jury what Dan Callahan said to you at that time about Grace Carey?

A. He said he did that to Grace and that she was not afraid."

VII.

That the Court erred in giving the following instruction that:

"The defendant is charged with rape on the person of Grace Carey, committed on the twenty-fifth day of June, 1915, * * * nevertheless, where, as in this case, the prosecution by its evidence has elected to prove an offense upon a certain day, to-wit: the twenty-fifth day of June, 1915, they are bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant

> at the time and place testified to by the witnesses in this case, and in the manner and form as charged in the indictment, before you can find the defendant guilty."

In answering the objections of plaintiff in error in the order that they appear in the brief, the Government takes the position that the indictment is not defective because it failed to allege that the carnal knowledge was *with her consent* (referring to the consent of the said Grace Carey), and in this connection attention is called to the fact that a careful review of all of the authorities cited on page of counsels' brief, in support of the position that it was necessary to allege the phrase "with her consent," in the indictment, was not germane to the point in issue, with perhaps one exception, and that is the case of *State* vs. *Carl,* decided by the Supreme Court of Ohio, January 3, 1905, and reported on page 463, 73 Northwestern Reporter; and counsel for plaintiff in error must have read the dissenting opinion, otherwise they would not have cited this case in support of their proposition, for the opinion supports the position taken by the Government and is directly opposed to that taken by the plaintiff in error.

The facts are as follows:

Carl was indicted by the Grand Jury for abusing and carnally knowing a female person under the age of sixteen years, he being more than eighteen years of age. The indictment charged that the defendant "being then and there a male person of the

age of eighteen years and upward, did unlawfully, knowingly, carnally know and abuse one E. W. *with her consent,* she, the said E. W. then and there being a female person under the age of sixteen years, to-wit: of the age of fourteen years, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio." When, upon the witness stand, she testified that she *did not consent* to the intercourse, but that it was accomplished by the defendant forcibly and against all the resistance she was able to interpose. Thereupon counsel for defendant asked the Court to direct the jury to return a verdict for the defendant upon the ground that, *with respect to her consent,* there was a fatal variance between the indictment and the evidence. That direction was given by the Court, and the prosecuting attorney's exception thereto presents the question which is for consideration here.

Judge Shanck, in determining the matter, said:

> "The ruling of the Judge of the Court of Common Pleas must have been prompted by the view that the phrase 'with her consent' defines an essential element of the crime charged. At least, that view pervades the brief in support of the ruling. To justify the ruling it is essential that the view be maintained, since a variance is a disagreement between the allegations and the proof in an essential matter. *In this view, the omission of the phrase 'with her consent' would have rendered the indictment fatally defective,* because of the failure to charge an essential element of the crime. It imputes to the Legislature an intention to make

> an act of the character of this a crime if committed *with consent,* although under the circumstances it would not be if committed *without consent. Obviously the terms of the statute do not require that it be so astonishingly interpreted.* In this regard the effect of the statute is to nullify the consent of the female under sixteen years of age. It is as if with respect to such persons the provision was that the crime shall be complete notwithstanding her consent. To say that the view taken by the Judge of the Court of Common Pleas is necessary in order that the accused may have proper opportunity to prepare his defense, is only another mode of presenting the same *misconception of the statute.* The essential elements of the crime charged are the commission of the act by a male person more than eighteen years of age upon a female person less than sixteen years of age. * * *"

For other authorities on the point that it is not necessary to allege in the indictment that the act was committed "with her consent," see 33 Cyc., page 1444, and other cases cited.

Section 1894 of the Compiled Laws of Alaska provides:

> "That whoever has carnal knowledge of a female person, forcibly and against her will, or, being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, *with her consent,* is guilty of rape."

Under this section it is obvious that the indictment would be good, either with, or without the phrase "with her consent," as the phrase "with her

consent'' is only inserted for the purpose of showing that the perpetrator of the crime is guilty of the crime of rape upon a female person under the age of sixteen years, even though she consents to the same. Plaintiff in error could not have been misled, or in any way prejudiced by the omission of this phrase since he would be guilty of the crime of rape if he carnally knew the female in question while she was under the age of sixteen.

In answer to the second assignment of error, to the effect that ''the Court denied the defendant a public trial in violation of Article VI of the Amendments to the Constitution of the United States,'' the Government first directs attention to the order of the Court, which is as follows:

> ''On the Court's own motion, the Court ordered that all persons of the general public, not properly having business before the Court, be excluded from the courtroom during the trial of this cause.''

This question has already been determined in this Circuit, in the case of *Regan* vs. *United States*, 202 Fed. 488, and since this case so clearly recites the rule governing the question, the Government feels safe in referring only to this case as an authority which conclusively settles the question.

However, where the evidence is of a particularly indecent and vulgar character, the Court undoubtedly has the right to exclude from the courtroom the general public, or those who do not have

business before the Court. This may be done in the interests of public morality.

People vs. *Hall,* 51 N. Y. Appeals, Div. 57, 64 N. Y. Suppl. 433.

In reply to the third assignment of error, that the Court erred in permitting Laura Herrington to testify to a conversation that she had with the prosecuting witness, Grace Carey, the Government calls attention to the fact that this conversation was had immediately following the crime (Trans. pp. 40, 43, 44, 45), and while the facts were exceedingly fresh in the mind of the prosecuting witness. The rule seems to be well established that the injured party may make complaint of the injury, if done so recently after the occurrence of the crime.

People vs. *Wilmot,* 139 Cal. 103.

In this case, after discussing the question of the introduction of evidence concerning the complaint of an injured person, violently assaulted and outraged, and the reason for allowing the evidence of such complaint to be introduced, the Court further stated as follows:

> "The reason for the rule admitting such testimony would appear to be wanting in the case where the act is accomplished with a female who fully understands the nature thereof, and freely and voluntarily submits thereto. Doubtless, however, evidence of the fact of complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this Court has in this respect made no distinction between cases where there

> was actual resistance and those where resistance and non-consent were conclusively inferred by the law."

Counsel for plaintiff in error contend that the conversation between the witness Laura Herrington and Grace Carey was not in the nature of a complaint and inadmissible, but the complaint in question was so soon after the crime that it might well be considered a part of the *res gestae.*

> *Barnes* vs. *State,* 88 Ala. 204, 16 Am. State Reports 48, 7 So. Report 38;
>
> *State* vs. *Fitzsimmons,* 18 R. I. 236, 49 State Reports 766.

In discussing the general rule concerning the introduction of the evidence covering the complaint made in a case of this kind, the Court, in the case of *State* vs. *Hoskinson,* 96 Pac. Rep., pp. 138-140, stated as follows:

> "In the case of an adult person who had consented to the act, a complaint would not be expected, and so it was said in the Daugherty case, that, the reason failing, the rule also fails. *The reason, however, does not fail where outrages are charged upon children of tender age.* For such children to make complaints of such abuse to their mothers, or others in whom they confide, is natural, and the testimony that they did so may properly be admitted in the discretion of the Court, in view of the age and intelligence of the child, and the time when, and the circumstances under which, the complaints were made, having regard to the reason upon which the rule rests. This child was thirteen years of age and the ruling of the Court

admitting testimony of her complaints would be approved if such testimony had been limited to the fact that she did so complain."

Many cases hold that the particulars of the complaint are admissible where the prosecutrix or party assaulted is of tender years.

People vs. *Marrs,* 125 Mich. 376, 84 N. W. 284;

People vs. *Glover,* 71 Mich. 303, 38 N. W. 874;

People vs. *Gage,* 62 Mich. 271, 28 N. W. 835, 4 Am. State Rep. 854;

Hannon vs. *State,* 70 Wis. 448, 36 N. W. 1.

In reply to the fourth assignment of error set forth on page 12 of counsels' opening brief, to the effect that the Court erred in permitting the prosecuting witness, Grace Carey, to testify to other acts of sexual intercourse with defendant, the Government calls attention to all of the testimony given by her on this subject, which is as follows:

"Q. Did the defendant, Dan Callahan, have sexual intercourse with you before that time?

A. Yes; lots of times.

Q. When was the first time (Objection of defendant's counsel.)

A. Before he went down to Ruby.

Q. How old were you?

A. I was only about nine years old, about ten; either nine or ten.

Q. Tell the jury who was the first man that had sexual intercourse with you. (Counsel for defendant objects.)

A. Dan Callahan.

Q. Where did that occur?

A. Over to Dan Callahan's house.

Q. Did he give you anything particular after that?

A. Yes, he gave me twenty-five cents.

Q. Where, let us know, did he have sexual intercourse with you?

A. Over at his barn and at his house and another little house right near the barn.

Q. In the town of Fairbanks?

A. Yes.

Q. Did you ever tell anybody about this except Laura Herrington?

A. No.

Q. Is she the only one?

A. Yes."

Prior solicitations to have intercourse with accused have been held to be admissible.

Wharton's Criminal Law, p. 899;

State vs. *Allison,* 24 S. D. 622, 124 N. W. 747.

And evidence of prior acts of intercourse and statements of defendant are proper matters of investigation and admissible.

State vs. *Sysinger,* 25 S. D. 110, 125 N. W. 879;

People vs. *O'Sullivan,* 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880;

Lawson vs. *State,* 20 Ala. 65, 56 Am. Decisions 182;

33 Cyc. 1458, and cases cited;

State vs. *Marvin,* 35 N. H. 22;

Wharton's Criminal Evidence, 45, 46, 49.

In view of the above decisions it cannot be said that the questions asked of the prosecuting witness and the answers given by her concerning acts of intercourse, other than the act for which defendant was indicted, resulted in prejudicial error.

In reply to the fifth assignment of error, referred to on page 12 of the brief of plaintiff in error, to the effect that there was no evidence to show that the defendant ever carnally knew the prosecuting witness, the Government first directs attention to the latter's testimony (pp. 39, 40, 41 trans.). The evidence shows very clearly that the prosecuting witness went to the home of defendant, removed part of her clothes, at which time the defendant got on top of her and had "full sexual intercourse" with her.

The rule is well settled that penetration may be proved even by circumstantial evidence.

State vs. *Devorss,* 221 Mo. 469, 120 S. W. 75.

In the present case, however, the testimony appears to be conclusive. Proof of intercourse is sufficient proof of penetration—especially where the female is under the statutory age of consent.

Wharton Criminal Law, p. 871;

State vs. *Devorss,* 221 Mo. 469, 120 S. W. 75.

With the testimony of the prosecuting witness and the corroborating circumstances, there should be no question as to the sufficiency of the evidence to support the verdict of the jury.

State vs. *Bartlett,* 127 Iowa 689, 104 N. W. 285;

State vs. *Waters,* 132 Iowa 481, 109 N. W. 1013;

State vs. *Ralston,* 139 Iowa 44, 116 N. W. 1058.

It is idle for counsel to compare this case with the Wooldridge case recently decided by the above Court, for they are as different as night and day. In the Wooldridge case we were dealing with an attempt to commit the crime of rape, while here, we are dealing with the actual commission of the crime. In the Wooldridge case there was no overt act shown on the part of defendant, while in the present case there is ample evidence to show the commission of the crime of rape.

Assignment six on page 16 of counsel's opening brief, to the effect that the Court erred in permitting the witness Laura Herrington to testify concerning a conversation she had had with defendant, is fully answered in the Government's reply to the fourth assignment of error herein.

In answer to the seventh and last assignment of error, set forth in the brief of plaintiff in error, to

the effect that the Court erred in giving the following instruction to the jury, namely:

> "Nevertheless, where, as in this case, the prosecution by its evidence has elected to prove an offense upon a certain day, to-wit: the twenty-fifth day of June, 1915, they are bound to prove to your satisfaction, beyond a reasonable doubt, that such offense was committed by the defendant at the time and place testified to by the witness in this case, and in the manner and form as charged in the indictment, before you can find the defendant guilty."

The Government is of the opinion that this instruction is incorrect insofar as it compels the prosecution to prove that the crime of rape was committed on the very date that it was alleged in the indictment to have been committed, but inasmuch as the evidence would indicate that the crime was committed on or about that date and the jury "found the defendant, Dan Callahan, guilty of the crime, as charged in the indictment," the defendant is now in no position to complain of the instruction. In a crime of this character it is not essential to prove its commission upon a particular date.

33 Cyc. 1455, and cases cited.

But inasmuch as the jury was satisfied that the crime was committed upon the date alleged in the indictment, from the evidence introduced, their verdict should not be disturbed.

In conclusion, the Government, after giving this case a careful consideration, is of the opinion that

the errors which crept into the record, if any, were not prejudicial to the rights of the defendant and are not sufficient to justify the Court in reversing the judgment rendered in the lower Court.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Defendant in Error.

No. 2846

United States

Circuit Court of Appeals

For the Ninth Circuit.

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of JOHN ROSENFELD, Deceased,

Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2846.

LOUIS ROSENFELD et al.,

Plaintiffs in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue, etc.

Defendant in Error.

Stipulation That Entire Record be not Printed.

It is hereby stipulated and agreed that the original exhibits and the following designated papers need not be printed in the Transcript of Record; Petition for Writ of Error; Citation on Writ of Error; Order Allowing Writ of Error; Cost Bond; Stipulation Waiving Jury, etc.; Memorandum of Costs; Orders of Court Overruling Demurrers to Complaint and Amended Complaint; Praecipe for Record; Stipulation as to Original Exhibits; Summons and Marshal's Return; Demurrers to Complaint and Amended Complaint; Orders Extending Time for Return Day of Writ of Error; Title of Court and Cause to all papers except first one.

Dated August 24, 1916.

JOHN W. PRESTON,
United States Attorney.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs in Error.

[Endorsed]: No. 2846. In the United States Circuit Court of Appeals for the Ninth Circuit. Louis

Rosenfeld et al., Plaintiffs in Error, vs. Joseph J. Scott, Collector of Internal Revenue, etc., Defendant in Error. Stipulation That Entire Record be not Printed. Filed Aug. 26, 1916. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustees Under the Last Will and Testament of JOHN ROSENFELD,

Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Complaint.

Plaintiffs above named complain of the defendant and respectfully state as follows:

I.

That the defendant, August E. Muenter, is now, and has been since the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having his official place of residence in the City and County of San Francisco, State and Northern District of California.

II.

That previous to said 1st day of October, 1907, when said defendant, August E. Muenter, became the duly appointed, qualified and acting Collector of

Internal Revenue as aforesaid, John C. Lynch was and had been during all of the times in this complaint alleged up to the 1st day of October, 1907, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First Collection District of California, having its official place of residence in the City and County of San Francisco, State and Northern District of California, and was succeeded on said 1st day of October, 1907, as Collector of Internal Revenue, by the defendant, August [2*] E. Muenter, as aforesaid.

III.

That on May 28th, 1902, John Rosenfeld died in the City of New York, being at the time of his death and for a long time previous thereto, a resident of the City and County of San Francisco, State and Northern District of California, leaving a last will and testament, which was thereafter admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, on or about June, 15, 1902.

IV.

That, according to the terms of said last will and testament, Louis Rosenfeld and Henry Rosenfeld were duly named and appointed the executors of said last will and testament of John Rosenfeld, deceased.

V.

That, on or about June 15, 1902, letters testamentary of the said will were duly issued and granted to the said Louis Rosenfeld and Henry Rosenfeld, by

*Page-number appearing at foot of page of original certified Transcript of Record.

the Superior Court of the State of California, in and for the City and County of San Francisco, and said Louis Rosenfeld and Henry Rosenfeld thereupon duly qualified and entered upon their duties as such executors, and ever since have been and now are the duly appointed, qualified and acting executors of said last will and testament of said John Rosenfeld, deceased.

VI.

That the residuary personal property left by said testator by the terms of the said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal succession tax (which estimate is for the purpose of this action acquiesced in by the plaintiff) amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta Fischer, a **[3]** sister of John Rosenfeld, deceased, the sum of $20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Louis Rosenfeld, an-

other son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of $57,969.55.

VII.

That, on the 29th day of July, 1903, the said John C. Lynch, assuming to act as such Collector of Internal Revenue as aforesaid, and under the Act of Congress commonly known as the "War Revenue Law" of June 13, 1898 (also known as the Federal succession tax law), did by force and duress exact, demand and collect, from said executors of said last will and testament of said John Rosenfeld, deceased, the sum of four thousand and sixty-two and 90/100 (4,062.90) dollars, claiming the same to be a lawful assessment under said Act on account of the legacies above set forth.

That said tax of $4,062.90 was imposed and assessed by said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, as follows:

On the sum of $20,000, the same being the share of the estate left to Mrs. Margitta Fischer, a sister of the testator, John Rosenfeld, deceased, the tax of $150, being at the rate of 75 cents for every hundred dollars of said sum of **[4]** $20,000; on the further sum of $57,969.55, the same being the share of the estate left to Henrietta Romer, a daughter of said testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Sarah Eppstein,

a daughter of said testator, a tax of $652.15, being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Lucy Isabella Weill, a daughter of the testator, the tax of $652.15 being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Max S. Rosenfeld, a son of the testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Louis Rosenfeld, a son of the testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Henry Rosenfeld, a son of the testator, the tax of $652.15 being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55.

VIII.

That said sum of $4,062.90 was paid from the funds and property of said estate by said executors of said last will and testament of John Rosenfeld, deceased, as aforesaid, involuntarily and under protest and protesting that they were not as such executors, nor was the estate represented by them, nor were said legacies hereinabove named, or any of them, liable to pay said tax. [5]

VIII½.

That on June 30, 1903, the said Louis Rosenfeld and Henry Rosenfeld were discharged as executors

by order and decree of the Superior Court of the State of California, in and for the City and County of San Francisco, and said Court thereupon appointed said Louis Rosenfeld and Henry Rosenfeld trustees of said estate under the terms of said last will and testament of John Rosenfeld, deceased, and said *Henry* Rosenfeld and Henry Rosenfeld ever since have been and now are the duly appointed, qualified and acting trustees of said estate.

IX.

That each and every of the shares of said estate left to said legatees above named were paid to said persons and each of them on or about June 30, 1903, by order of the Superior Court of the State of California, in and for the City and County of San Francisco.

X.

That thereafter and on June 2, 1905, Louis Rosenfeld and Henry Rosenfeld, as trustees, aforesaid of said last will and testament of John Rosenfeld, deceased, duly filed with said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, a claim for the refunding of said tax of $4,062.90, so collected as aforesaid, and appealed to the Commissioner of Internal Revenue, from the action and decision of said John C. Lynch, as the then Collector of Internal Revenue as aforesaid, in holding said executors of the last will and testament of said John Rosenfeld, deceased, and the estate represented by them as such executors and the legacies above mentioned, and each of them, liable to the payment of said legacy tax of $4,062.90,

and in collecting the said legacy tax in the manner aforesaid, and represented to the said Commissioner that the collection of said tax was unlawful and that the **[6]** amount thereof should be refunded for the following reasons among others:

That said John Rosenfeld died in the City of New York on May 28, 1902, and under the United States statutes as they then stood, no war revenue tax became due or payable for one year after death; that said law was repealed and said appeal became effective July 1, 1902; that, under the decisions of Capp v. Mason, 94 U. S. 589, Mason v. Sargent, 104 U. S. 689, Eideman, Collector of Internal Revenue, etc., v. Tilghman et al., executors, etc., 136 Fed. Rep. 141, the legacy internal revenue tax imposed and collected by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, was and is illegal and erroneous and without authority of law, and should be refunded.

XI.

That more than six months have expired since the taking of said appeal to said Commissioner for the refunding of said tax, and said Commissioner has neither allowed nor disallowed said claim.

XII.

That no part of said tax of $4,062.90 has been refunded or repaid to said plaintiffs, as such executors or otherwise or to the estate represented by them, or to said legatees above mentioned or to any other person, or at all, and that the said sum of $4,062.90 is still due, owing and unpaid.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of $4,062.90 with interest and costs of this action.

MARSHALL B. WOODWORTH,
EDWARD LANDE,
Attorneys for Plaintiff. [7]

State of California,
City and County of San Francisco,—ss.

Louis Rosenfeld, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action, that he has read the within Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on his information and belief, and as to those matters, he believes them to be true.

LOUIS ROSENFELD.

Subscribed and sworn to before me this 27th day of November, 1907.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 9, 1910.

[Endorsed]: Filed November 27, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

[Title of Court and Cause.]

Answer.

Comes now the defendant and answering plaintiff's Complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of plaintiffs' Complaint.

II.

Admits the allegations of paragraph II of plaintiffs' Complaint.

III.

Admits the allegations of paragraph III of plaintiffs' Complaint.

IV.

Admits the allegations of paragraph IV of plaintiffs' Complaint.

V.

As to the allegations of paragraph V of plaintiffs' Complaint to the effect that Louis Rosenfeld and Henry Rosenfeld were at the time of the commencement of this action the duly appointed, qualified and acting executors of the last will and testament of John Rosenfeld, deceased, defendant alleges that he [13] has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon said ground, he denies that the said plaintiffs were such executors or that either of them was an executor of said will at said time, either appointed, or qualified, or acting.

VI.

Admits the allegations of paragraph VI of plaintiffs' Complaint.

VII.

Admits the estate of the said John Rosenfeld, deceased, paid the legacy tax of Four Thousand Sixty-two and 90/100 (4,062.90) Dollars imposed and assessed as set forth in paragraph VII of said Complaint upon the legacies of personal property mentioned and described in said paragraph VII and in said paragraph VI of the plaintiffs' Complaint. Defendant denies that he collected the said taxes or any portion thereof by force or duress, or by force or duress. Defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by defendant, in either exacting, demanding or collecting the said tax.

VIII.

Defendant denies that the said taxes were or that any portion thereof was paid under protest, either oral or in writing or under any claim of any kind specifying that the said taxes were unlawful and that there was no liability to pay the same, or under any other claim of illegality whatever.

IX.

As to the allegations of the said Complaint to the effect that the plaintiffs are the owners of the alleged cause of action set forth in plaintiffs' Complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the said

allegations, and placing his answer upon that ground, [14] he denies that the plaintiffs own or have any interest, or either owns or has any interest in the alleged cause of action set forth in plaintiffs' Complaint; and upon the same ground the defendant denies that the plaintiffs are or that either of them is trustee of the said estate.

X.

Admits the allegations of paragraph X of plaintiffs' Complaint.

XI.

Admits that no part of the said taxes paid as herein admitted or alleged has ever been repaid by the defendant, or the United States of America.

WHEREFORE defendant prays that plaintiff take nothing by this action, and for costs of said suit,

ROBT. T. DEVLIN,
United States Attorney,
Attorney for Defendant. [15]

State and Northern District of California,
City and County of San Francisco,—ss.

August E. Muenter, being first duly sworn, deposes and says:

That he is the Collector of the Internal Revenue of the United States for the First Collection District of California, and the defendant herein; that he has read the foregoing Answer and knows the contents thereof; that the same is true except as to the matters which are therein stated on information and

belief, and that as to those matters, he believes it to be true.

AUG. E. MUENTER.

Subscribed and sworn to before me this 9th day of October, 1908.

[Seal] W. B. MALING,

Deputy Clerk U. S. Circuit Court, Northern District of California.

Service of the within Answer by copy admitted this —— day of Oct. 1908.

MARSHALL B. WOODWORTH,

Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 9, 1908. Southard Hoffman Clerk. By W. B. Maling, Deputy. [16]

At a stated term, to wit, the November term A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 7th day of December, in the year of our Lord one thousand nine hundred and ten: Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD et al., etc.,

vs.

AUGUST E. MUENTER, etc.

Order That Findings be Filed and Judgment Entered in Favor of Plaintiffs.

This cause came on this day for trial before the Court, sitting without a jury, Marshall B. Woodworth, Esq., appearing on behalf of the plaintiffs and George Clark, Esq., Assistant United States Attorney, appearing on behalf of the defendant. Evidence on behalf of the respective parties was introduced and closed and the cause was submitted to the Court for consideration and decision and the same being fully considered, it was ordered that findings be filed and judgment entered herein in favor of plaintiffs for the sum of $3,912.90, with interest thereon and for costs. [17]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

This cause having been tried by the Court without a jury, a jury having been waived, the Court, after due consideration, makes the following Findings and Facts and Conclusions of Law:

I.

That the plaintiffs, Louis Rosenfeld and Henry Rosenfeld, were, and each of them was, at all of the times in the Complaint alleged, and now are, and each of them is, the duly appointed, qualified and acting trustees, under the trust declared by the last will and testament of John Rosenfeld, deceased.

II.

That at all the times in the Complaint alleged,

Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max. S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld were, and now are, beneficiaries under the trust declared by the last will and testament of John Rosenfeld, deceased.

III.

That at all of the times in the said Complaint alleged, Mrs. Margitta Fischer was a legatee under the last will and testament of John Rosenfeld, deceased, and that, in and by said last will and testament, said Mrs. Margitta Fischer was bequeathed the sum of $20,000.

IV.

That John C. Lynch was the duly appointed, qualified and [18] acting Collector or Internal Revenue for the First Collection District of California, at all of the times mentioned in said Complaint, and up to October 1, 1907, at and from which time, August E. Muenter became the duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California, and ever since has been, and now is such Collector of Internal Revenue, and was substituted as party defendant in the place and stead of John C. Lynch.

V.

That John Rosenfeld died on or about May 28, 1902, in the City of New York, being at the time of his death and for a long time previous thereto a resident of the City and County of San Francisco, State of California, and leaving a last will and testament, which was thereafter admitted to probate in accordance with proceedings taken under the laws

of the State of California, on or about June 15, 1902.

VI.

That according to the terms of said last will and testament, Louis Rosenfield and Henry Rosenfeld were duly named and appointed the executors of said last will and testament of John Rosenfeld, deceased.

VII.

That on or about June 15, 1902, the said Superior Court duly made and entered its order admitting said last will and testament to probate and appointed said Louis Rosenfeld and Henry Rosenfeld executors thereof, who thereafter duly qualified and continued to act as executors until the close of the administration of said estate, to wit, on or about July 13, 1903. [19]

VIII.

That after proceedings regularly had and taken in said probate proceedings, by an order and judgment of said Superior Court, duly given and made on July 13, 1903, the property of said estate was, by final decree of distribution, distributed to Louis Rosenfeld and Henry Rosenfeld as trustees under the trust declared by said last will and testament and included in said property so distributed in trust to said Louis Rosenfeld and Henry Rosenfeld, as aforesaid was personal property, to be held in trust for the beneficiaries above named, and of the values set opposite their respective names, viz.:

Henrietta Romer, personal property of the value of..... .....$57,969.55

Sarah Eppstein, personal property of the value of..... .....$57,969.55

Lucy Isabella Weill, personal property of the value of.....$57,969.55

Max S. Rosenfeld, personal property of the value of.....$57,969.55

Louis Rosenfeld, personal property of the value of.....$57,969.55

Henry Rosenfeld, personal property of the value of.....$57,969.55

IX.

That the above stated values of the personal property to be held in trust, and which were held in trust, for the above-named beneficiaries, were the values as assessed on July 29, 1903, by said John C. Lynch, the then Collector of Internal Revenue.

X.

That said personal property, so to be held in trust for the above-named beneficiaries, of the values set opposite their respective names as above stated, was to be held and is now being held, under the terms of the last will and testament of said John Rosenfeld, in trust by said Louis Rosenfeld and Henry Rosenfeld as such trustees and the income thereon paid by said trustees to the said beneficiaries, in being provided in said last will and testament that the said trusts shall continue in existence for the period of eleven years after the [20] death of said testator, provided some one of his children and beneficiaries, therein named and herein above referred to should so long survive, otherwise the trusts should terminate upon the death of the last surviving of his said children and beneficiaries named in said last will and

testament and whose names are set out in paragraph VIII of this findings of facts.

XI.

That, under the terms of said last will and testament of said John Rosenfeld, deceased, said trusts will not expire until the 28th day of May, 1913, provided some one of his children therein named, and whose names are set out in paragraph VIII of this Findings of Facts shall so long survive.

XII.

That all of the said children of said John Rosenfeld, deceased, and the beneficiaries of the trusts provided for in his said last will and testament, whose names are set forth in paragraph VIII of this Findings of Facts, were living and surviving at the time of the repeal of the Act of Congress of June 13, 1898, as amended by the Act of March 2, 1901, to wit, on July 1, 1902, and now are and each of them is alive and surviving.

XIII.

That said incomes derived from said personal property and legacies above named of the values above set out to be held in trust as aforesaid for said beneficiaries above named, do not, nor does any one of them, amount to the sum of $10,000 each year, or at all.

XIV.

That on July 29, 1903, said John C. Lynch, the then Collector of Internal Revenue for the First Collection District of California, acting under and by virtue of the provisions of the Act of Congress

of June 13, 1898, as amended by the [21] Act of Congress of March 2, 1901, and the rules and regulations of the United States Internal Revenue Department in such cases made and provided, assessed said Louis Rosenfeld and Henry Rosenfeld, the plaintiffs in this action, an Internal Revenue tax, aggregating the sum of $4,062.90, said tax being assessed upon the legacies distributed to said Louis Rosenfeld and Henry Rosenfeld, in trust as above stated for the above-named beneficiaries as follows:

On the sum of $20,000, the same being the share of the estate left to Mrs. Margitta Fischer, a sister of the testator, John Rosenfeld, deceased, the tax of $150, being at the rate of 75 cents for every hundred dollars of said sum of $20,000; on the further sum of $57,969.55, the same being the share of the estate left to Henrietta Romer, a daughter of said testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dollars of the said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Sarah Eppstein, a daughter of said testator, a tax of $652.15, being at the rate of $1.12½ on every hundred dollars of the said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Lucy Isabella Weill, a daughter of the testator, the tax $652.15 being at the rate of $1.12½ on every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Max S. Rosenfeld, a son of the testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dol-

lars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the estate left to Louis Rosenfeld, a son of the testator, the tax of $652.15 being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55; on the further sum of $57,969.55, the same being the share of the [22] estate left to Henry Rosenfeld, a son of the testator, the tax of $652.15, being at the rate of $1.12½ for every hundred dollars of said sum of $57,969.55, aggregating the sum total, as above stated, of $4,062.90.

XV.

That on July 29, 1903, Louis Rosenfeld and Henry Rosenfeld, trustees as aforesaid, paid to the then Collector of Internal Revenue for the First Collection District of California, the sum of $4,062.90, which sum was paid by said Louis Rosenfeld and Henry Rosenfeld, as trustees, to the then Collector of Internal Revenue for and on behalf of the beneficiaries above named.

XVI.

That said assessment and payment of said tax $4,062.90 as aforesaid were made under protest.

XVII.

That said John C. Lynch, the then Collector of Internal Revenue, and said Commissioner of Internal Revenue, and said August E. Muenter, the present defendant and successor in office of said John C. Lynch have at all times refused to refund said sum of $4,062.90, or any part thereof, and that the whole and every part still remains unpaid and unrefunded.

From which foregoing Findings of Facts, I deduce and make and enter the following Conclusions of Law:

I.

That Louis Rosenfeld and Henry Rosenfeld are the proper parties plaintiff and have the legal capacity to institute and maintain this action:

II.

That the personal property and legacies distributed, under the terms of the last will and testament of John Rosenfeld, deceased, to said Louis Rosenfeld and Henry Rosenfeld in trust, and to be held in trust for the above-named children and beneficiaries [23] of said John Rosenfeld, deceased, were, and each of them was, contingent beneficial interests, which did not vest absolutely in possession or enjoyment, within the meaning of the Act of Congress of June 27, 1902, prior to the repeal of the Act of Congress of June 13, 1898, as amended by the Act of Congress of March 2, 1901, which took effect on July 1, 1902.

III.

That said taxes, so assessed, imposed and paid as aforesaid upon the several legacies as aforesaid, were, and each of them is, illegal and erroneous, and each of them was erroneously and illegally assessed, imposed and collected and without authority of law.

IV.

That the personal property and legacy distributed to Mrs. Margitta Fischer, under the terms of the last will and testament of John Rosenfeld, deceased,

was not to be held in trust for said Mrs. Margitta Fischer and was not a contingent, beneficial interest within the meaning of the Act of Congress of June 27, 1902, but the said personal property and legacy vested absolutely in possession or enjoyment previous to July 1, 1902, the date of the repeal of the Act of Congress on June 13, 1898, as amended by the Act of Congress March 2, 1901.

V.

That said plaintiffs, or either of them, as trustees, or at all, are not entitled to recover the sum of $150, the same being the tax on the personal property and legacy of the clear value of $20,000, bequeathed by the last will and testament of said John Rosenfeld, deceased, to Mrs. Margitta Fischer.

VI.

That the plaintiff recover judgment against the defendant, as Collector of Internal Revenue for the First Collection District of California, in the sum of $3,912.90, being the [24] aggregate account of taxes assessed, imposed and paid as aforesaid upon the shares of the estate of John Rosenfeld, deceased, bequeathed in trust to Louis Rosenfeld and Henry Rosenfeld for and on behalf of the children and beneficiaries above named, to wit: Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld, together with interest on said sum at the rate of seven per cent per annum from July 29, 1903, the same being the date when said taxes were paid to the then Collector of Internal Revenue, and with interest

from the date of said judgment and cost of suit as taxed.

Dated Jan. 18th, 1911.

WM. C. VAN FLEET,
Judge.

Approved.

GEO. CLARK,
Asst. U. S. Atty.

[Endorsed]: Filed Jan. 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

[Title of Court and Cause.]

Judgment on Findings.

This cause having come on regularly for trial upon the 7th day of December, 1910, being a day in the November, 1910, term of said court, before the Court, sitting without a jury, a trial by jury having been duly waived by stipulation filed, Marshall B. Woodworth, Esq., having appeared as attorney for plaintiffs and George Clark, Esq., Assistant United States Attorney having appeared as attorney for the defendant, and the trial having been proceeded with upon the 7th day of December in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having, after arguments by the attorneys for the respective parties been submitted to the Court for consideration and decision and the Court, after due deliberation having filed its findings in writing

and ordered that judgment be entered herein in accordance therewith and for costs:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Louis Rosenfeld and Henry Rosenfeld, as trustees under the last Will and Testament of John Rosenfeld, plaintiffs do have and recover of and from August E. Muenter, as Collector of Internal Revenue, for the First District of California, defendant, the sum of [26] Five Thousand Nine Hundred Fifty-eight and 80/100 ($5,958.80) Dollars, together with their costs in this behalf expended taxed at $ ——.

Judgment entered January 18, 1911.

SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

A True Copy. Attest:
[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit,

Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 18th day of January, 1911.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed January 18, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

At a stated term, to wit, the March term, A. D. 1912, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 13th day of May, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD et al.

vs.

AUGUST E. MUENTER,

Collector.

Order That Mandate be Spread upon the Minutes.

Upon motion of M. B. Woodworth, Esq., attorney for plaintiffs, it was ordered that the Mandate

of the United States Circuit Court of Appeals for the Ninth Circuit, herein, be filed and spread upon the minutes of this court, which said Mandate is in words and figures following, that is to say: [29]

Mandate of U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

[Seal U. S. Circuit Court of Appeals.]

WHEREAS, lately in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a cause between Louis Rosenfeld and Henry Rosenfeld, as Trustees Under the Last Will and Testament of John Rosenfeld, Plaintiffs, and August E. Muenter, Collector of Internal Revenue, Defendant, No. 14,615, a judgment was duly filed and entered on the 18th day of January, A. D. 1911, in favor of the said plaintiffs and against the said defendant; which said judgment is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by August E. Muenter, as Collector of the

Internal Revenue of the United States for the First Collection District of California as plaintiff in error against Louis Rosenfeld and Henry Rosenfeld, as Trustees Under the Last Will and Testament of John Rosenfeld as defendants in error agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

AND WHEREAS, on the eighth day of November in the year of our Lord one thousand nine hundred and eleven the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted to the Court for consideration and decision on briefs:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged [30] by this Court, that the judgment of the said Circuit Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the District Court of the United States for the Northern District of California, Second Division, with leave to the parties to amend their pleadings and for further proceedings. (April 1, 1912.)

YOU, THEREFORE, ARE HEREBY COMMANDED That such further proceedings be had in the said cause in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said Circuit Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the

ninth day of May, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-sixth.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 14,615. In the District Court of the United States, Northern District of California, Second Division. Louis Rosenfeld et al. vs. August E. Muenter, Collector, etc. Mandate of the United States Circuit Court of Appeals for the Ninth Circuit. Filed and Spread upon the Minutes of said District Court this 13th day of May, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [31]

[Title of Court and Cause.]

Amendment to Complaint.

Now come the plaintiffs above named and, leave of the Court having first been obtained, file this amendment to complaint:

They hereby amend paragraph VI of the Complaint heretofore filed herein, by eliminating the following words from the beginning of said paragraph contained in brackets, which words are as follows: "which estimate is for the purpose of this action acquiesced in by the plaintiff," and by so changing and modifying said paragraph VI as to make it read in the words and figures following, to wit:

VI.

"That the residuary personal property left by

said testator by the terms of said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax, amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta Fischer, a sister of John Rosenfeld, deceased, the sum of $20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55; [32]

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Louis Rosenfeld, another son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Henry Rosenfeld, another son of John Rosenfeld, deceased, the sum of $57,969.55.

That said estimate and assessment of said residuary personal property left by said testator, as made as aforesaid by said John C. Lynch, the then collector of Internal Revenue as aforesaid, was and is excessive, erroneous and illegal and should have been estimated by said John C. Lynch, the then

Collector of Internal Revenue as aforesaid, as follows, to wit:

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, Deceased, the sum of $20,313.62;

The share of the estate left to Sarah Eppstein, another daughter of said John Rosenfeld, deceased, the sum of $20,313.62;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of $20,313,62;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of $20,313.62;

The share of the estate left to Louis Rosenfeld, another son of the said John Rosenfeld, deceased, the sum of $20,313.62;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of $20,313.62."

"That the taxes imposed by the said John C. Lynch, assuming to act as such Collector of Internal Revenues as aforesaid, based upon his assessment, as aforesaid, of the residuary personal property left by said testator, of the several legacies or shares [33] of estate left respectively to Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld, and Henry Rosenfeld, upon the sum of $57,969.55 to each of said legatees, was and is excessive, erroneous and illegal, and that the taxes which should have been imposed by said Collector of Internal Revenue was and is

upon the estimate or assessment of $20,313.62, that being the value of the legacy or share of estate which in law should have been estimated and assessed by said Collector of Internal Revenue, and upon which taxes should have been imposed by him in accordance with the law and regulations enacted in that regard."

WHEREFORE plaintiffs pray that this amendment be allowed and that these plaintiffs may have judgment upon their original complaint as thus amended and for their costs and interests.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

EDWARD LANDE,
Of Counsel.

Received copy of within amended complaint, Aug. 5, 1912.

JOHN L. McNAB,
U. S. Atty.
By E. H. PIER.

[Endorsed]: Filed Aug. 5, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

[Title of Court and Cause.]

Answer to Complaint as Amended.

Now comes the defendant and answering plaintiffs' Complaint as amended on file herein, admits, denies and alleges as follows:

I.

Admits paragraph I of plaintiffs' Complaint as amended.

II.

Admits paragraph II of plaintiffs' Complaint as amended.

III.

Admits paragraph III of plaintiffs' Complaint as amended.

IV.

Admits the allegations of paragraph IV of plaintiffs' Complaint as amended.

V.

As to the allegations of paragraph V of plaintiffs' Complaint to the effect that Louis Rosenfeld and Henry Rosenfeld were at the time of the commencement of this action the duly appointed, qualified and acting executors of the last will and testament of John Rosenfeld, deceased, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon said ground, he denies that the said plaintiffs were such executors or that either of them was an executor of said will at said time, either appointed, or qualified, [38] or acting.

VI.

In answering paragraph VI defendant admits that the residuary personal property left by said testator by the terms of said will as aforesaid, as estimated by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, for the purpose of the Federal Succession Tax, amounted in value as follows, to wit:

The share of the estate left to Mrs. Margitta

Fischer, a sister of John Rosenfeld, deceased, the sum of $20,000;

The share of the estate left to Henrietta Romer, a daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Sarah Epstein, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Lucy Isabella Weill, another daughter of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Max S. Rosenfeld, a son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Louis Rosenfeld, another son of said John Rosenfeld, deceased, the sum of $57,969.55;

The share of the estate left to Henry Rosenfeld, another son of said John Rosenfeld, deceased, the sum of $57,969.55.

In further answer to said paragraph VI, defendant denies that said estimate and assessment or estimate or assessment of said residuary personal property left by said testator as made as aforesaid by said John C. Lynch, the then Collector of Internal Revenue as aforesaid, was and is or was or is excessive, erroneous and illegal or excessive, erroneous or illegal and should or should have been estimated by said John C. Lynch, the then Collector of Internal Revenue as set forth in said amendment to bill of complaint or should have been estimated otherwise then as the said John C. Lynch actually did es-

timate the value of said estate. [39]

And the said defendant further answering said paragraph VI of amendment to Bill of Complaint denies that the said John C. Lynch should have estimated the value of the estate left to Henrietta Romer at the sum of $20,313.62 or in any other sum less than $57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Sarah Eppstein at the sum of $20,313.62 or in any other sum less than $57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Lucy Isabella Weill at the sum of $20,313.62 or in any other sum less than $57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Max S. Rosenfeld at the sum of $20,313.62 or in any other sum less than $57.969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Louis Rosenfeld at the sum of $20,313.62 or in any other sum less than $57,969.55.

And further answering said amendment to Bill of Complaint, defendant denies that the said John C. Lynch should have estimated the value of the estate left to Henry Rosenfeld at the sum of $20,313.62 or in any other sum less than $57.969.55.

And defendant further denies in answer to paragraph VI of said amendment to Bill of Complaint that the taxes imposed [40] by the said John C. Lynch, assuming to act as such Collector of Internal Revenue, as aforesaid, or otherwise, based upon his assessment of the residuary personal property left by said testator of each of the several legacies or shares of the estate left respectively to Henrietta Romer, Sarah Eppstein, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld upon the sum of $57,969.55 to each of said legatees, was and is or was or is excessive, erroneous and illegal or excessive or erroneous or illegal.

And further answering said paragraph VI of amendment to Bill of Complaint, denies that the taxes which should have been imposed by said Collector of Internal Revenue was and is or was or is upon the assessment or estimate of $20,313.62 or any other sum less than $57,969.55 on each or any of the several legacies or shares of said estate left respectively to Sarah Eppstein, Henrietta Romer, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld.

And further answering paragraph VI of said amendment to Bill of Complaint, defendant denies that $20,313.62 or any other sum less than $57,969.55 is the value of the legacy or share of the estate left to each of said Sarah Eppstein, Henrietta Romer, Lucy Isabella Weill, Max S. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld which in law should have been estimated and assessed or estimated or assessed by said Collector of Internal Revenue or

upon which the taxes should have been imposed by him in accordance with law or the requirements enacted in that regard; and in this behalf alleges that the said John C. Lynch, then acting as Collector of Internal Revenue, should have assessed the said taxes as he actually did assess them as hereinbefore set forth.

VII.

In answer to paragraph VII of said Complaint defendant denies [41] that the said John C. Lynch, or that any officer under him in the service of the Internal Revenue Department of the United States, did collect the said taxes or any portion thereof by force and duress or by force or duress.

And further answering said paragraph of said Complaint as amended, defendant alleges that the taxes were voluntarily paid and that there was no force, actual or threatened, and no duress of any kind exercised by said defendant in either exacting, demanding or collecting the said tax.

VIII.

Defendant denies that said taxes were or that any portion thereof was paid under protest, either oral or in writing, or under any claim of any kind specifying that said taxes were unlawful or that there was no liability to pay the same or under any other claim of illegality whatsoever.

And further answering paragraph VIII, defendant denies that said sum of $4,062.90 or any other sum so paid as set forth in said paragraph VIII of Complaint as amended, or that said sum was paid involuntarily and under protest or involuntarily or un-

der protest or protesting that they were not as such executors nor was the estate represented by them nor were said legacies liable to pay said tax.

IX.

As to the allegations of the said Complaint to the effect that the plaintiffs are the owners of the alleged cause of action set forth in plaintiffs' Complaint, defendant alleges that he has no information or belief sufficient to enable him to answer the said allegations, and placing his answer upon that ground, he denies that the plaintiffs own or have any interest, or either owns or has any interest in the alleged cause of action set forth in plaintiffs' Complaint; and upon the same [42] ground the defendant denies that the plaintiffs are or that either of them is trustee of the said estate.

X.

Plaintiff admits the allegations contained in paragraph X of said Complaint and further alleges that the only ground upon which a refunding of said tax of $4,062.90 was made to the Collector of Internal Revenue for the First District of California and upon which an appeal to the Commissioner of Internal Revenue was based was the ground set forth in said paragraph X of said Complaint.

XI.

Admits that no part of said taxes paid as herein admitted has ever been repaid by the defendant or the United States of America.

WHEREFORE, defendant prays that plaintiff take nothing by this action and for costs of suit.

JOHN L. McNAB,
United States Attorney,
Attorney for Defendant.

Verification waived.

MARSHALL B. WOODWORTH,
Atty. for Plaintiff.

Received copy of within answer to complaint as amended this —— day of May, 1913.

MARSHALL B. WOODWORTH,
Atty. for Plaintiff.

May 8/13.

[Endorsed]: Filed May 8. 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [43]

At a stated term, to wit, the July term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 22d day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,615.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustee Under the Last Will and Testament of John Rosenfeld,

Plaintiffs,

vs.

AUGUST E. MUENTER, Collector of Internal Revenue,

Defendant.

Order of Substitution of Defendant.

It appearing that this suit was brought against John C. Lynch, as Collector of Internal Revenue for the First Collection District of California, and it further appearing that the subject matter of said suit relates to the official liability of said John C. Lynch, as such Collector of Internal Revenue, and it further appearing that after the filing of said suit the said John C. Lynch resigned on October 1, 1907, as such Collector of Internal Revenue, and that his resignation was duly accepted to take effect on October 1, 1907, and that August E. Muenter was appointed Collector of Internal Revenue in the place and stead of said John C. Lynch, and that said August E. Muenter duly qualified as such Collector of Internal Revenue on October 1, 1907, and continued to be the duly appointed, qualified and acting Collector of Internal Revenue from October 1, 1907, to September 1st, 1913, [44] upon which date *John* J. Scott, having been previously appointed

Collector of Internal Revenue in the place and stead of said August E. Muenter, duly qualified as such Collector of Internal Revenue, and now is, and ever since has been duly appointed, qualified and acting Collector of Internal Revenue for the First Collection District of California;

IT IS NOW HERE ORDERED, that Joseph J. Scott be substituted as defendant in the place and stead of August E. Muenter, and that said suit be hereafter entitled and maintained against said Joseph J. Scott, as Collector of Internal Revenue. [45]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 14,615.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustees Under the Last Will and Testament of John Rosenfeld,

Plaintiffs,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant.

Judgment.

This cause having come on regularly for trial upon the 7th day of April, 1914, being a day in the March, 1914, term of said court, before the Court, sitting without a jury, a trial by jury having been specially waived by stipulation filed, Marshall B.

Woodworth, Esq., appearing as attorney for plaintiffs, Earl H. Pier and M. A. Thomas, Esqrs., appearing as attorneys for defendant; and the trial having been proceeded with and oral and documentary evidence upon behalf of the respective parties having been introduced and the evidence having been closed and the cause having been submitted without arguments upon briefs filed, and the Court, after due deliberation, having filed its opinion and ordered that judgment be entered herein in favor of plaintiffs and against defendant in the sum of $1,432.19, together with interest thereon at 7% per annum from July 29, 1903, to May 8, 1916, and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Louis Rosenfeld and Henry Rosenfeld, as trustees under the last will and testament of John Rosenfeld, plaintiffs, do have and recover of and from Joseph J. Scott, Collector of Internal Revenue, defendant, the sum of Two Thousand Seven Hundred Twelve and 93/100 [46] ($2,712.93) Dollars, together with their costs in this behalf expended, taxed at $60.60.

Judgment entered May 8, 1916.

WALTER B. MALING,
Clerk.

A True Copy. Attest:
[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: Filed May 8, 1916. Walter B. Maling, Clerk. [47]

[Title of Court and Cause.]

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 8th day of May, 1916.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 8, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

[Title of Court and Cause.]

Engrossed Bill of Exceptions.

Be it remembered that on April 7th, 1914, the above-entitled cause came on for trial before the Court sitting without a jury, a trial by jury having been waived in writing by counsel for the respective parties, and thereupon the following proceedings took place, Mr. Marshall B. Woodworth, appearing for the plaintiffs, and Mr. Earl H. Pier, Assistant United States Attorney, appearing for the defendant.

Mr. Marshall B. Woodworth made an opening statement to the Court on behalf of the plaintiffs,

and thereupon the following proceedings were had and evidence and testimony, oral and documentary, were introduced in evidence on behalf of the plaintiffs and on behalf of the defendant, as follows:

Testimony of Henry Rosenfeld, for Plaintiffs.

HENRY ROSENFELD, called as a witness on behalf of the plaintiffs, being first duly sworn, testified:

My name is Henry Rosenfeld. I reside in San Francisco. I knew John Rosenfeld during his lifetime. He [53] was my father. He died on May 28, 1902. He left five other children other than myself. He left six children, varying in age from about—Mrs. Rosner was at that time about 40, Mrs. Epstein, about 38; Louis Rosenfeld, about 37; Henry Rosenfeld, 35; Lucy Weill, about 32; Max Rosenfeld, about 27. My father left real and personal property at the time of his death. He left a last will and testament, which was presented for probate in the Superior Court of the City and County of San Francisco, State of California. The records in the probate proceedings were destroyed in the fire of April, 1906. They were all restored later.

Thereupon there was admitted in evidence, without objection, a certified copy of the petition to establish record, notice of application to restore record, proof of posting on application to restore record, and order establishing record, in the Matter of the Estate of John Rosenfeld, deceased, No. 1624, New Series, Department No. 9 of the Superior Court of the State of California, in and for the City and

(Testimony of Henry Rosenfeld.)

County of San Francisco, which certified copy of documents contained the last will and testament of John Rosenfeld, deceased, and other documents relating to the probate of his will, which documents were marked "Plaintiffs' Exhibit No. 1."

(Witness continuing:) Louis Rosenfeld and Henry Rosenfeld were named as executors in that will. The same parties were named as trustees under the terms of the trust created by the will. We were discharged as executors and assumed our duties as trustees in June, 1903. In June, 1903, we became the trustees, myself and my brother Louis. We are still the duly appointed, qualified and acting trustees of that trust. We [54] have never been discharged. I remember paying a tax to the Collector of Internal Revenue on the property passing under the will and covered by that trust. I consulted my attorneys after receiving a notice that we were indebted to the sum of $652.15 as a tax on each legacy, which notice required us to pay it or be subject to a penalty. My attorneys advised me—Mr. W. S. Goodfellow was my attorney at the time. He advised me that I would have to pay the tax but I would have to protest it with the Collector at the time I paid it. I did—on July 29, 1903—protested at the time I made the payment to Mr. Thomas, the Deputy Collector. I paid this tax on July 29, 1903. At the time I paid this tax I was directed to make out and file what is known as a legacy return and schedules attached thereto. That is the paper. (Examining legacy return.)

(Testimony of Henry Rosenfeld.)

(Said paper was introduced and offered in evidence and marked Plaintiffs' Exhibit No. 3 on Retrial.)

I paid the money. The protest was a verbal one. I afterwards asked for a return of the tax. No return was made of the tax or of any portion thereof.

On cross-examination, the witness Henry Rosenfeld, testified as follows:

I did not file a written protest. (To the Court:) I made a demand afterwards. The demand was in writing. (To Mr. Pier:) I did not make it personally. I was not present at the time the demand was made. I was present at the time the first protest was made. I made that myself. I will have to ascertain the dates of the birth of each of my brothers and sisters. I have only given the dates approximately.

Mr. WOODWORTH.—I would suggest that Mr. Rosenfeld be permitted to prepare a list of the dates of the births [55] of his brothers and sisters some time this afternoon after he leaves the stand and present it to the Clerk or Reporter.

Mr. PIER.—Under the terms of this will the interest which each of these children took being a life interest in the estate it will be necessary to determine the life interest which each took under the will by ascertaining their ages—

Mr WOODWORTH.—That is where counsel and I differ. The term of the trust was eleven years and it ended absolutely at the end of that period.

(Testimony of Henry Rosenfeld.)

Mr. PIER.—The situation is this, your Honor. The property was held in trust for eleven years, at the end of the eleven years to be distributed among the six children. That would constitute, at least the amount of the estate which they took under the will would be, a life interest in a sixth of the estate of each of them, and therefore the Government is entitled to a tax on the sixth interest of each of them in the estate. That is the position of the Government at this time.

The COURT.—That is a matter for future consideration. You can proceed and ascertain the ages.

Mr. PIER.—You will give me a list of the dates of the births of your brothers and sisters?

Mr. WOODWORTH.—Mr. Rosenfeld, you can make a list of the ages of your brothers and sisters and give it to the United States Attorney this afternoon—

The COURT.—And the dates of their births.

Mr. PIER.—XQ. You are Henry Rosenfeld?

A. Yes, sir.

XQ. What is the date of your birth?

A. 1865.

XQ. And the day of the month?

A. June 22d.

Mr. WOODWORTH.—There is a place for the ages in [56] this legacy return but it is not filled in at all, the Government officers evidently considering the ages of the legatees as not being of any importance.

(Testimony of Henry Rosenfeld.)

Mr. PIER.—That is all, excepting, of course, there is the understanding that you are to furnish us with the dates of births of your brothers and sisters.

Testimony of Frank H. Driscoll, for Plaintiffs.

Thereupon FRANK H. DRISCOLL was called as a witness on behalf of the plaintiffs, and, being first duly sworn, testified:

I reside at 5130 Congress Avenue, Oakland, California. I am Special Gauger of the Internal Revenue Department. I have been connected with the United States Government 19½ years at San Francisco. I am familiar as such officer with the Internal Revenue Department of the Government especially as to the assessment, imposition and collection of taxes on legacies during the Spanish-American War. I was such officer at the time covered here by this complaint—in 1903. As such officer I had official duties to perform in regards to the assessment of taxes on these legacies, but not to the collection. My superior attended to the collection of the taxes. The Commissioner of Internal Revenue has promulgated an official mortuary table. The book handed me, called Compilation of Decisions rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898, edition of January, 1899, printed in the Government Printing Office at Washington, and especially pages 195 to 199 contained the official Mortuary table or list. It is the order of the Commissioner of Internal Revenue which affords us a basis

(Testimony of Frank H. Driscoll.)

of calculations with reference to the assessment of taxes on legacies.

Thereupon the book was introduced and admitted in evidence, especially pages 195 to 199, and marked "Plaintiffs' [57] Exhibit No. 2."

Mr. WOODWORTH.—Q. I will hand you this mortuary table, Mr. Driscoll, and ask you, using the language of the Circuit Court of Appeals, what would be the tax on the value of the right to receive the annual income from the sum of $57,969.55 for the period of eleven years?

Mr. PIER.—I object to that question, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial, and on the further ground that the interests that passed to the children under this will were life interests and not interests for a term of years.

Mr. WOODWORTH.—Well, of course, the will speaks for itself.

The COURT.—I will take it subject to the objection. You may answer the question.

A. The tax due the Government would be $252.35.

Mr. PIER.—I object to the question on the ground that it calls for the conclusion of the witness, and further on the ground that it implies what is not the fact—

The COURT.—A question containing an assumption?

Mr. PIER.—Yes; that is, as to the amount of the tax on the value of the interests passing to the children. I make that further objection to that ques-

(Testimony of Frank H. Driscoll.)

tion. As the law fixes the amount of the tax it will be for the Court to determine the amount in this case. It will be for the witness to determine the value of the interests passing, but not as to the amount of the tax.

The COURT.—Of course that is a mere mathematical calculation, but I think that the objection is good, and I should suggest that the witness state the value of the interests passing. I will sustain the objection. [58]

Mr. WOODWORTH.—Q. Mr. Driscoll, will you state to his Honor what would be the value of the right to receive the annual income from this $57,969.55; in other words, what sum would you tax as a Government officer? A. $20,313.62.

Q. That would be as to each legacy?

A. Yes, each of the six.

Q. And what is the rate of tax?

A. 75/100 of 1%; 75¢ on each $100.

The COURT.—Q. The amount you say, would be $20,313.62? A. Yes, sir.

On cross-examination, the witness Frank H. Driscoll testified as follows:

(By Mr. PIER.)

XQ. Mr. Driscoll, you are basing your valuation of the interests passing to each of these legatees upon the assumption that they only get the income for eleven years. Is not that true?

A. It is an annuity; yes.

XQ. An annuity for eleven years? A. Yes.

(Testimony of Frank H. Driscoll.)

XQ. What would be the value of a life estate in a right to receive the income from $57,*060*.55 passing to a person forty years of age?

Mr. WOODWORTH.—We object to that question as incompetent, irrelevant and immaterial, and not within any of the issues involved here.

The COURT.—I will take it subject to the objection.

A. I would have to make my calculations. I haven't made them on that basis.

Mr. WOODWORTH.—We make further objection, if your Honor please, that the question assumes that this sum did not vest previous to the repeal of the law. [59]

The COURT.—He is not asking him that. He is asking what would be the value of a life estate in a right to receive the income from that sum to a person forty years of age.

Mr. PIER.—Mr. Driscoll not having made these computations, and Mr. Rosenfeld not having given the dates of the births of his brothers and sisters, may we have the dates of the births given later to Mr. Driscoll by Mr. Rosenfeld so that he can make the computations?

The COURT.—Yes, as you haven't all the evidence here you will abide by the statement of Mr. Rosenfeld as to the dates of the births, and Mr. Driscoll can make his computations. You had better have Mr. Rosenfeld furnish those to him and then hand them in and have them introduced in evidence.

(Testimony of Frank H. Driscoll.)

At the conclusion of the testimony of witness F. H. Driscoll, the following proceedings took place:

Mr PIER.—If your Honor please, I move to strike out the testimony of the witness Driscoll entirely upon the ground that his testimony is incompetent, irrelevant and immaterial, and that the theory upon which the claim was presented to the Collector of Internal Revenue, and which I contend must be followed in a suit to collect the tax, has not been followed in this matter, and that the present suit is based upon a different theory from that set forth in his claim for a refund. A claim for a refund must be made under sections 3228, 3229 and 3230, I believe, of the Revised Statutes. Those sections set out a prescribed method by which a claim for a refund must be made. In that claim for a refund they must set forth the ground upon which they claim a refund. The grounds upon which they claimed a [60] refund were those specified in Paragraph X of the Complaint. Such being the grounds upon which they claimed a refund before the Collector of Internal Revenue, they cannot now come before the Court, I contend, and ask for a refund on any other theory than that on which they claimed a refund before the Collector of Internal Revenue. That being our position, the testimony of Mr. Driscoll as to a valuation of the estate, or a portion of the estate, in other words, testimony to show an excessive valuation of the estate, which was not raised before the Collector, is immaterial at this time.

(Testimony of Frank H. Driscoll.)

The COURT.—Hasn't the Supreme Court virtually held that a demand for the return of this tax isn't necessary?

Mr. WOODWORTH.—Yes, your Honor.

Mr. PIER.—No, the Court has not held that. Mr. Woodworth refers to an opinion of the Attorney General in which he was considering a case of recovering a tax upon a contingent interest. This is a tax upon a vested interest, and it is claimed that the tax was based upon an excessive valuation, and not having raised the point before the Collector they are not entitled to make a claim for it now.

The COURT.—I see your point.

Mr. WOODWORTH.—It is unfortunate that every time counsel has raised that point the Court has ruled against him.

The COURT.—Hasn't the Circuit Court of Appeals ever decided it?

Mr. PIER.—No. They said that the value was too small to be taken into consideration. The question has never been decided by the Circuit Court of Appeals. They have merely mentioned the question whether the valuation was [61] excessive and passed it without determination.

Mr. WOODWORTH.—On the petition for a rehearing in Muenter vs. Frederich that was practically the only point made by the gentleman in a brief of about fifteen pages, to which I replied. The petition for a rehearing was denied. I will hand that to your Honor. In his brief on the petition for a rehearing in Muenter vs. Bliss, he elaborated upon

(Testimony of Frank H. Driscoll.)

the point that these claims are governed by Section 3228, and inasmuch as the claim was not couched in certain language we could not recover anything, and the Circuit Court of Appeals, after careful consideration, decided against him.

The COURT.—What did they decide?

Mr. WOODWORTH.—They denied it. The petitions for rehearing were both denied. The case of Muenter vs. Bliss was decided in favor of the plaintiffs. The Attorney General has said that the refunding of money paid as taxes under the War Revenue Act is an act of bounty on the part of the Government, irrespective of any claim for a refund, and this matter was briefed and argued before the Court in Muenter vs. Friedrich.

The COURT.—I will reserve a ruling on the question at this time, and, you having made the objection, if I determine that the evidence is incompetent it simply will not be considered.

Thereafter Henry Rosenfeld delivered the following memorandum to the Reporter: "Ages of beneficiaries, according to Will: Daughter Henrietta Rossner, born May 4, 1860; daughter Sarah Eppstein, born June 2, 1861; son Louis Rosenfeld, born June 16, 1863; son Henry Rosenfeld, born June 22, 1865; daughter Lucy I. Weill, born August [62] 16, 1869, son Max L. Rosenfeld, born May 8, 1873."

And thereafter Frank H. Driscoll delivered the following memorandum to the Reporter:

(Testimony of Frank H. Driscoll.)

"San Francisco, Cal., April 8, 1914.

"The Honorable the United States District Court,
San Francisco, California.

"Sir: The following data, the result of computation of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 28, 1902, in income from the sum of $57,969.55, at 4%, $2,318.782, are submitted:

To Henrietta Rosener, daughter, born May 4, 1860; age 42 years; amount taxable, $33,903.42; rate, $1.12½ tax..... $381.41

To Sarah Epstein, daughter; born June 2, 1861; age 40 yrs; amount taxable, $34,997.25; rate, $1.12½ tax..... 393.72

To Louis Rosenfeld, son; born June 16, 1863; age 38 yrs; amount taxable $36,020.45; rate $1.12½; tax..... 405.23

To Henry Rosenfeld, son; born June 22, 1865, age 36 yrs; amount taxable, $36,978.89, $1.12½; tax 416.01

To Lucy I. Weill, daughter, born August 16, 1869; age 32 yrs; amount taxable, $38,720.09, $1.12½; tax 435.60

To Max L. Rosenfeld, son; born May 8, 1873; age 29 yrs; amount taxable $39,882.27; rate $1.12½; tax 448.74

Total Tax.....$2,480.71

"In computing the foregoing the annuity or present value of one dollar due at the end of each

(Testimony of Frank H. Driscoll.)

year during the life of a person of specified age was, as to each, as follows:

"Henrietta Rosner, 42 yrs., $14,621.22; Sarah Epstein, 40 yrs., $15,09*295;* Louis Rosenfeld, 38 yrs., $15,53*421*; Henry Rosenfeld, 36 yrs., $1594*755*; Lucy I. Weill, 32 yrs., $16,69*846*; Max L. Rosenfeld, 29 yrs., $17,20*225*. **[63]**

"Respectfully submitted,

F. H. DRISCOLL."

Thereupon the plaintiffs rested their case.

The defendant thereupon rested, and the case was submitted for decision.

Thereafter, on May 8, 1916, the Court, having duly considered said cause, rendered its written decision in words and figures following, to wit: **[64]**

[Title of Court and Cause.]

Opinion.

MARSHALL B. WOODWORTH, of San Francisco, for Plaintiffs.

JOHN W. PRESTON, U. S. Attorney, and ANNETTE ABBOTT ADAMS, Asst. U. S. Attorney, of San Francisco, for Defendant.

VAN FLEET, District Judge:

On the former trial, this court held that the interests upon which the tax was assessed and collected were entirely contingent, beneficial interests, not vested in possession and enjoyment, and hence, under the doctrine of Vanderbilt v. Eidman, 196 U. S. 480, and other cases following it, were not sub-

ject to tax under the War Revenue Act, and that the tax was illegal and void. Judgment was accordingly given for the recovery of the entire tax. The Circuit Court of Appeals, while sustaining the view of this court that the *corpus* of the legacies under the will of John Rosenfeld had not vested at the time of assessment, and were not subject to the tax in gross, held, that under the principles announced in the later case of U. S. v. Fidelity Trust Co., 222 U. S. 158 (decided pending the appeal), the **[65]** rights given the beneficiaries by the will to receive the income of the legacies "were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue tax, and assessable, not upon the gross amount of the legacy, but upon the value of the rights to receive the annual income"; and the case was accordingly remanded for further proceedings, with a right in the plaintiffs to amend their complaint accordingly.

Having amended their pleading to conform to the changed aspects of the case and meet the views of the Court of Appeals, the plaintiffs at the present trial have proceeded on the same theory as at the first, that their right of recovery remains under section 3 of the Refunding Act of June 27, 1902, and made their case accordingly. That section provides:

> "That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the act approved June 13, 1898, entitled 'An Act to Provide Ways and Means to Meet

War Expenditures, and for Other Purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests, which shall not have become vested prior to July first, nineteen hundred and two."

The defendant strenuously contends that the theory upon which plaintiffs have proceeded is erroneous; that, under the decision of the Circuit Court of Appeals, that section furnishes no basis for recovery; that the Court, having held that, to the extent of the annual income, the rights given plaintiffs under the will were vested rights, it results that the tax collected must be regarded as one involving a mere overvaluation of such vested interests, and **[66]** that the right of the plaintiffs to recover, if at all, is governed by the provisions of sections 3226, 3227 and 3228 of the Revised Statutes, to the requirements of which the plaintiffs' proofs have not conformed.

But I am of the opinion that this contention involves a misapprehension of the remedial scope of section 3 and a failure to fully appreciate what the Refunding Act was intended to accomplish. Its evident purpose was, as an act of justice by the Govern-

ment, to provide a means to restore to the citizens moneys to which the Government was not entitled, but which he had been required to pay, by reason of a misconstruction by the revenue officers of the provisions of the War Revenue Act, and as to the recovery of which the existing statutes afforded no adequate remedy; and that it was intended to cover all instances where, as a result of the administration of that Act, taxes had been to any extent illegally or unjustly assessed and collected is, I think, from its comprehensive language, quite obvious. By its very terms it contemplates that the tax may have been to some extent properly assessed, as being based upon a vested interest, and hence the provision that only to the extent that it exceeds such basis shall be refunded; that is, "*so much* of said tax as may have been collected on contingent, beneficial interests which shall not have become vested." The present case falls clearly within the scope of the Act. It matters not whether we say the assessment was erroneous because an overvaluation of vested interests, or because one made wholly upon interests which had not vested. Either is within the wrong Congress intended to redress, and both are equally within the remedial provision of the statute. Nor does the decison of the **[67]** Circuit Court of Appeals operate to take the case out of the provisions of this Act. That Court clearly indicates by its opinion that, while the tax as assessed was in part based upon vested rights subject to the Revenue Act, it covered interests which were not so vested,

and that, as to such excess, plaintiffs should be entitled in this action to recover.

This construction is in harmony with that of the Department of Justice. In his opinion rendered to the Secretary of the Treasury for his guidance as to the scope and purpose of the Act of June 27, 1902, the learned Attorney General says:

> "The provisions of the Act are special, and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S., sec. 3228.) Suits brought to recover money due under this Act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The Act by its terms, creates and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (U. S. vs. Wardell, 172 U. S. 48.)
>
> "It will be observed that under the provisions of this statute Congress has granted a right of

repayment regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial."

Op. Atty. Genl., Vol. 26, p. 194.

See, also, Thatcher vs. U. S., 149 Fed. 902.

The question as to the extent of the vested interests [68] remains. The will of Rosenfeld creating a trust to continue for eleven years, during which period the beneficiaries were to receive the annual income, and at its expiration the principal of *corpus* of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the income for the definite term of eleven years; defendant, on the other hand, contending that the vested interests of each was to the income for life, since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. The latter is, I think, the correct construction. It is not a case where, at the termination of the trust period, the right to receive the income might, on the happening of some contingency, pass to some one other than the beneficiary, but where, by the vesting of the *corpus* of the legacy at the termination of that period the right to the income would still remain for life.

The total tax assessed and collected on the gross amount of the legacies given by the will was $4,062.90, which included a tax of $150 on a legacy to Margitta Fisher, not here in controversy. The tax on the legacies here in question was, therefore, $3,912.90. The evidence shows that the tax properly assessable on the rights of these beneficiaries was $2,480.71. The excess tax is thus represented by the difference between the latter sum and the sum of $3,912.90 actually collected, or $1,432.19, for which latter sum the plaintiffs are entitled to judgment, with interest at the legal rate from the date of payment, and for their costs.

Let judgment be entered accordingly. **[69]**

Thereupon the Court allowed to each of said parties the benefit of any and all exceptions to the various rulings of the Court in admitting and rejecting evidence and in its decision upon the facts and law of the case.

The above bill of exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial of the above-entitled case.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that all exhibits introduced upon the trial of the above-entitled cause and now in the custody of the clerk of the court shall be deemed to be included as part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in said bill of exceptions.

Dated June 2d, 1916.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

JNO. W. PRESTON,
Attorney for Defendant. **[70]**

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and for the defendant that the foregoing Bill of Exceptions has been presented in time, and that it be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects, and that the same shall be made a part of the record in said case and be the Bill of Exceptions therein, and that said Bill of Exceptions may be used by either parties plaintiff of defendant upon any writ of error sued out by either parties plaintiff or defendant.

Dated June 2, 1916.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs.

JNO. W. PRESTON,
Attorney of Defendant.

Order Approving and Settling Bill of Exceptions.

The foregoing Bill of Exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by either parties plaintiff or defendant upon any writ of error sued out by either parties plaintiff or defendant.

Dated June 2d, 1916.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Jun. 7, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[71]**

[Title of Court and Cause.]

Assignment of Errors.

Now come the plaintiffs in the above-entitled action, by Marshall B. Woodworth, Esq., their attorney, and specify the following as the errors upon which they will rely and which they will urge upon their Writ of Error in the above-entitled action, to wit:

I.

The Court erred in rendering judgment in favor of the plaintiffs in the sum only of $1,432.19, with interest at the legal rate from the date of payment and for their costs instead of the sum of $2,998.80, with interest and costs, that being the amount prayed for in the amended complaint.

II.

The Court erred in not rendering judgment in favor of the plaintiffs and against the defendant in the sum of $2,998.80, with interests and costs.

III.

The Court erred in holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, to Henrietta Rosner a daughter, to Sarah Epstein, a daughter, to Lucy I. Weill, a daughter, to Max S.

Rosenfeld, a son, to Louis Rosenfeld, a son, to Henry [74] Rosenfeld, a son, was an annual income for the lives of said beneficiaries, and was not an annual income for the period of eleven years, at the end of which eleven years the trust provided by the last will and testament of John Rosenfeld, deceased, was to terminate.

IV.

The Court erred in not holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, to Henrietta Rosner, a daughter, to Sarah Epstein, a daughter, to Lucy I. Weill, a daughter, to Max S. Rosenfeld, a son, to Louis Rosenfeld, a son, to Henry Rosenfeld, a son, was an annual income only for the period of eleven years, that being the period, duration and length of the trust provided for by the last will and testament of John Rosenfeld, deceased.

V.

The Court erred in not holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, for the period of eleven years was the equivalent of an annuity for the period of eleven years and not the equivalent of a life estate, as held by the Court.

VI.

The Court erred in holding that the annual income to be taxed upon the legacies left in trust by the last will and testament of John Rosenfeld, for the period of eleven years was in effect the same as the annual

income for the lives of the respective beneficiaries, and that taxes should be imposed on said annual income during the lives of said beneficiaries instead of the period of eleven years, the period provided for as the duration of the trust by the last will and testament of John Rosenfeld, deceased.

VII.

That the Court erred in not following and adopting the [75] official course pursued by the Internal Revenue officers of the United States in assessing and computing the taxes upon the legacies left in trust by the last will and testament of John Rosenfeld, deceased, as an annuity for eleven years, or as the right to receive the annual income from the legacies left in trust in the sum of $57,969.55 to each of said beneficiaries for the term of eleven years, as testified to by Frank H. Driscoll, Internal Revenue officer of the United States, upon the trial of said cause.

VIII.

The Court erred in refusing to permit the following question to be asked of the witness Frank H. Driscoll and in sustaining the objection interposed by the attorney for the defendant to said question, as follows:

"Mr. WOODWORTH.—Q. I will hand you this mortuary table, Mr. Driscoll, and ask you, using the language of the Circuit Court of Appeals, what would be the tax on the value of the right to receive the annual income from the sum of $57,969.55 for the period of eleven years?

Mr. PIER.—I object to that question, if your

Honor please, on the ground that it is incompetent, irrelevant and immaterial and on the further ground that the interests that passed to the children under this will were life interests and not interests for a term of years.

Mr. WOODWORTH.—Well, of course, the will speaks for itself.

The COURT.—I will take it subject to the objection. You may answer the question.

A. The tax due the Government would be $252.35.

Mr. PIER.—I object to that question on the ground that it calls for the conclusion of the witness, and further on the ground that it implies what is not the fact— [76]

The COURT.—A question containing an assumption?

Mr. PIER.— Yes; that is, as to the amount of the tax on the value of the interests passing to the children. I make that further objection to that question. As the law fixes the amount of the tax it will be for the Court to determine the amount in this case. It will be for the witness to determine the value of the interests passing, but not as to the amount of the tax.

The COURT.—Of course that is a mere mathematical calculation, but I think that the objection is good, and I should suggest that the witness state the value of the interests passing. I will sustain the objection," to which ruling the Court duly and regularly allowed an exception.

IX.

The Court erred in overruling the objection made

by the attorney for the plaintiffs to the question propounded to the witness Frank H. Driscoll on cross-examination, as follows:

"XQ. What would be the value of a life estate in a right to receive the income from $57,969.55 passing to a person forty years of age?

Mr. WOODWORTH.—We object to that question as incompetent, irrelevant and immaterial, and not within any of the issues involved here.

The COURT.—I will take it subject to the objection.

A. I would have to make my calculations. I haven't made them on that basis.

Mr. WOODWORTH.—We make the further objection, if your Honor please, that the question assumes that this sum did not vest previous to the repeal of the law.

The COURT.—He is not asking him that. He is asking what would be the value of a life estate in a right to receive the [77] income from that sum to a person forty years of age.

Mr. PIER.—Mr. Driscoll not having made these computations, and Mr. Rosenfeld not having given the dates of the births given later to Mr. Driscoll by Mr. Rosenfeld so that he can make the computations?

The COURT.—Yes; as you haven't all the evidence here you will abide by the statement of Mr. Rosenfeld as to the dates of the births, and Mr. Driscoll can make his computations. You had better have Mr. Rosenfeld furnish those to him and then hand them in and have them introduced in evi-

dence," to which ruling the Court duly and regularly allowed an exception.

X.

The Court erred in overruling the objection made by the attorney for the plaintiffs to the introduction in evidence, in connection with the testimony of the witness Frank H. Driscoll on cross-examination, the following memorandum prepared by said Frank H. Driscoll at the request of the attorney for the defendant and delivered by said Frank H. Driscoll to the official reporter to be incorporated in the official transcript of the trial of the above-entitled case, which said memorandum was and is as follows:

"San Francisco, Cal., April 8, 1914.

"The Honorable the United States District Court,
San Francisco, California.

"Sir: The following data, the result of computations of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 28, 1902, in income from the sum of $57,969.55, at 4%, $2,318.782, are submitted:

To Henrietta Rosner, daughter, born May 4, 1860; age 42 years; amount taxable, $33,903.42; rate $1.12½ tax.....	$381.41
To Sarah Epstein, daughter; born June 2, 1861; age 40 years; amount taxable, $34,997.25; rate $1.12½; tax....	393.72
To Louis Rosenfeld, son; born June 16, 1863; age [78] *32* years; amount taxable, $36,020.45; rate, $1.12½; tax	405.23

To Henry Rosenfeld, son, born June 22 1865, age 36 years, amount taxable, $36,978.89, rate, $1.12½; tax 416.01

To Lucy I. Weill, daughter, born August 16, 1869; age 32 yrs.; amount taxable, $38,720.09; rate $1.12½; tax..... 435.60

To Max L. Rosenfeld, son, born May 8, 1873; age 29 yrs.; amount taxable, $39,882.27; rate $1.12½; tax..... 448.74

Total tax, $2,480.71

"In computing the foregoing the annuity, or present value of one dollar due at the end of each year during the life of a person of specified age was, as to each, as follows:

"Henrietta Rosner, 42 yrs., $14,621.22; Sarah Eppstein, 40 yrs., $15,09295; Louis Rosenfeld, 38 yrs. $15,53421; Henry Rosenfeld, 36 yrs., $15,94755; Lucy I. Weill, 32 yrs., $16,69846; Max L. Rosenfeld, 29 yrs., $17,20225.

"Respectfully submitted,

"F. H. DRISCOLL."

To which ruling the Court duly and regularly allowed an exception.

XI.

The Court erred in holding, as declared in its written opinion incorporated in the Bill of Exceptions: "That the vested interests of each (beneficiary) was to the income for life, since necessarily, under the terms of the will, the beneficiaries would

have and enjoy the income not only during the trust, but thereafter during their lives."

XII.

The Court erred in not rendering judgment in favor of plaintiffs and against the defendant in the sum of $4,062.90, that being the full amount of taxes assessed and collected by the defendant. [79]

XIII.

The Court erred in not holding that neither the *corpus* of the legacies left to the beneficiaries under the last will and testament of John Rosenfeld, deceased, nor the income therefrom, had ever vested previous to the repeal of the War Revenue Act on July 1, 1902, and that any taxes assessed and collected by the defendant came within the provisions of the Refunding Act of June 27, 1902.

XIV.

The Court erred in not holding that both the *corpus* of the legacies left to the beneficiaries under the last will and testament of John Rosenfeld, deceased, and any income therefrom, did not vest previous to the repeal of the War Revenue Act which took effect on July 1, 1902, and that any taxes assessed and collected by the defendant came within the provisions of the Refunding Act of June 27, 1902, as being taxes on contingent beneficial interests, it appearing that said John Rosenfeld died 32 days before the repeal of the War Revenue Act took effect on July 1, 1902, and that the administration of his estate had just begun and that the ten months period provided by the laws of the State of Califor-

nia for notice to creditors had not expired on July 1, 1902, and that the debts against said estate had not been ascertained and that said legacies under the last will and testament of John Rosenfeld, deceased, or any income therefrom, could not be ascertained or distributed until long after the repeal of the War Revenue Act took effect on July 1, 1902.

WHEREFORE, for many manifest errors committed by said Court, the plaintiffs through their attorney pray that said Court be directed to grant judgment in favor of said plaintiffs in the sum of $2,998.80, with interest and costs as prayed for in their amended Complaint, and for such other and further relief as the Court may think meet and proper.

MARSHALL B. WOODWORTH,
Attorney for Plaintiffs. [80]

Service of the within Assignments of Error by copy admitted this 24 day of June, 1916.

JNO. W. PRESTON,
Attorney for Defendant

[Endorsed]: Filed Jun. 24, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

[Title of Court and Cause.]

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing eighty-six (86) pages, numbered from 1 to 86, inclusive, are a full, true and correct copy of the record

and proceedings as enumerated in the praecipe for transcript on writ of error, as the same remain on file and of record in the above-entitled cause, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $51; that said amount was paid by the attorney for the plaintiffs, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of August, A. D. 1916.

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern District of California.

[Ten Cent Internal Revenue Stamp. Canceled Aug. 22, 1916. W. B. M.] [87]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court, before you, or some of you, between Louis Rosenfeld and Henry Rosenfeld, as trustees under the Last Will and Testament of John Rosenfeld, deceased, plaintiffs in error, and Joseph J.

Scott, Collector of Internal Revenue, defendant in error, a manifest error hath happened, to the great damage of the said Louis Rosenfeld and Henry Rosenfeld, as trustees under the last will and testament of John Rosenfeld, deceased, plaintiffs in error, as by said complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Cout of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 24th day of June, in the year of our Lord one thou-

sand nine hundred and sixteen.

[Seal] WALTER B. MALING,
Clerk, U S. District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by
WM. C. VAN FLEET,
Judge. [88]

Service of within writ of error by receipt of copy admitted this 24 day of June, 1916.

JNO. W. PRESTON,
U. S. Attorney.

The answer of the Judge of the District Court of the United States, for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk.

[Endorsed]: No. 14,615. United States Circuit Court of Appeals for the Ninth Circuit. Louis Rosenfeld et al., Plaintiffs in Error, vs. Joseph J. Scott, etc., Defendant in Error. Writ of Error.

Filed Jun. 24, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2846. United States Circuit Court of Appeals for the Ninth Circuit. Henry Rosenfeld, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased, Plaintiff in Error, vs. Joseph J. Scott, Collector of Internal Revenue, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed August 22, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2846.

LOUIS ROSENFELD and HENRY ROSENFELD, as Trustees Under the Last Will and Testament of JOHN ROSENFELD, Deceased,

Plaintiffs in Error.

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

Order That Litigation be Continued in the Name of Henry Rosenfeld.

It having been suggested to the Court by Mr. Marshall B. Woodworth, Counsel for the Plaintiffs in Error, that Louis Rosenfeld, one of the plaintiffs in error and one of the trustees of the trusts created by the Last Will and Testament of John Rosenfeld, deceased, having died, and it appearing that it is proper that said litigation should be conducted in the name of the sole surviving trustee, to wit, Henry Rosenfeld;

IT IS HEREBY ORDERED that said litigation be henceforth conducted by said Henry Rosenfeld, as sole surviving trustee under the trusts of the last will and testament of John Rosenfeld, deceased, and that the title of the above-entitled cause be changed and all proceedings hereafter conducted as follows:

"Henry Rosenfeld, Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased, vs. Joseph J. Scott, Collector of Internal Revenue."

No. 2846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and and Testament of JOHN ROSENFELD, Deceased,

Plaintiff in Error.

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

MARSHALL B. WOODWORTH,
Attorney for Plaintiff in Error.

BENAS & GILHOOLY, 509 SANSOME ST.

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No. 2846.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of JOHN ROSENFELD, Deceased,

Plaintiff in Error.

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,

Defendant in Error.

OPENING BRIEF ON BEHALF OF PLAINTIFF IN ERROR

Statement of the Case.

The questions presented in this case are of law. The facts are either conceded or undisputed by the defendant in error. The case was tried by the Court sitting without a jury, a trial by jury having been waived in writing. (See Bill of Exceptions; Transcript of Record, p. 42.)

The leading propsition involved, under the assignment of errors, is whether, under the terms of

the last will and testament of John Rosenfeld, deceased, the "*value* of the *rights* to receive the *annual income*" from certain *contingent* legacies for the period of *eleven years* (that being the duration of the trust provided for by the will), was the equivalent, for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented, of the "*value* of the *rights* to receive the annual income" *for life,* said income to be computed with the aid of mortuary tables.

Plaintiff in error contends that, inasmuch as the principal or corpus of the legacies left by the will of John Rosenfeld was contingent and not vested, and as the trust created by the will of John Rosenfeld was to continue for *eleven years,* the interest of each beneficiary, which was subject to a tax, was the "value of the rights to receive the *annual income*" for the definite term of *eleven years;* not for *life,* as was held by the Court below.

Defendant in error, on the other hand, contends that the interest of each beneficiary, which was subject to a tax, was the "*value* of the *rights* to receive the *annual income*" *for life,* because "the beneficiaries would have and enjoy the income not only *during the trust,* but thereafter *during their lives.*" (See opinion of Court below, Transcript of Record, p. 60.)

The trial Court upheld the contention of the defendant in error and held that the "*value* of the

rights to receive the annual income" for *eleven years* should, in effect, be treated as the right to receive the annual income *for life,* and that the defendant in error was entitled to retain the sum of $2,480.71 as taxes assessed on that basis, and gave judgment for plaintiff in error for the difference between $2,480.71 and the amount of taxes actually paid by them less a tax of $150.00 not here in controversy. Instead of giving judgment in favor of plaintiff in error in the sum of $2,998.80 with interest and costs as prayed for in the amended complaint, the Court below rendered judgment in favor of plaintiff in error in the sum of $1,432.19 with interest and costs, the defendant in error conceding, under the theory of the contention advanced by him, that the plaintiff in error was entitled to that sum at all events.

Therefore, while plaintiff in error succeeded in recovering judgment in the Court below, he did not recover the full sum of $2,998.80 with interest and costs, that being the amount claimed in the amended complaint.

Feeling dissatisfied with the judgment of the lower Court in that and other respects, to be pointed out hereafter, the plaintiff in error sued out this writ of error.

This case was before this Appellate Tribunal on a previous occasion. It was consolidated, for the purposes of hearing before this Court, with four other cases involving similar questions, as to

whether the legacies involved in the respective cases were contingent or vested legacies within the meaning of the War Revenue Act of June 13, 1898, c. 448, sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, sec. 10, 31, Stat. 946 (U. S. Comp. St. 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983).

It was then held by this Court that the legacies bequeathed under the last will and testament of John Rosenfeld, deceased, were contingent, and not vested legacies and that said legacies had not vested previous to the repeal of the War Revenue Act of June 13, 1898, as amended, which took effect on July 1, 1902, and that the then Collector of Internal Revenue had no right to impose and collect taxes of $652.15 on each of the six legacies upon the theory that the legacies had vested previous to the repeal of the law.

See Muenter vs. *Union Trust Co. et al.* and companion cases, 195 Fed. Rep. 480.

But, while holding that the legacies were contingent and therefore not subject to taxation, and affirming the decision of the lower Court to that extent, this Court held, nevertheless, that a tax should have been imposed, assessed and collected "*upon the value of the rights to receive the annual income as determined in United States* vs. *Fidelity Trust Company*" (222 U. S. 158, 32 Sup. Ct. 59), such value to be ascertained with the "*aid of the mortuary tables.*"

This case and another case were thereupon remanded to the lower Court, "with leave to the parties to amend their pleadings and for further proceedings."

The complaint in the case at bar was amended to conform to the ruling of this Court. Instead of asking for a judgment of $4,062.90, as demanded in the original complaint, the amended complaint prayed for a judgment in the sum of $2,998.80 with interest and costs. The case was retried, with the result, as above stated, that the plaintiff in error was awarded judgment in the sum of $1,432.19 with interest and costs instead of the sum, as prayed for in the amended complaint, of $2,998.80 with interest and costs, which latter sum was the amount he then considered he was entitled to under the views enunciated and the law as declared by this Court in its opinion rendered in this case upon the writ of error previously sued out.

It is to a wrong conception, by the learned trial Judge, of the decision of this Court as declared in the case of *Muenter* vs. *Union Trust Co. et al.,* that we attribute the adverse rulings and judgment of the Court below upon the retrial.

The syllabus of the decision of this Court, upon the previous writ of error, as reported in 195 Fed. Rep. 480, is as follows:

> "A legacy in trust to a trustee, who is to pay the net income to the legatee for a *term of years* until distribution, creates a vested in-

> terest in the beneficiary in such income *for the term,* which is assessable under War Revenue Act June 13, 1898, c. 448, sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, sec. 10, 31 Stat. 946 (U. S. Comp. St., 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), if it became vested before July 1, 1902, and amounted to $10,000.00."

This Court said, as to the facts of the case at bar, as follows:

> "In the third case, *Muenter* vs. *Rosenfeld,* the testator, John Rosenfeld, died on May 28, 1902, leaving a will which was duly probated, under which his estate was distributed. There were six legacies of $57,969.55 each, to be held in trust, the income thereof to be paid to the beneficiaries for the *period of eleven years, provided some one of the children and beneficiaries therein named should so long survive, otherwise the trusts to terminate upon the death of the last surviving of the said children and beneficiaries.* The trust expires on May 28, 1913."

We quote at length from the opinion of this Court, inasmuch as it announced the law of the case:

> "The question presented in the Court below was whether the personal property and legacies left under the terms of the respective wills to trustees, in trust for the respective beneficiaries, were contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment, and thereby became subject to the tax within the meaning of Act Cong. June 13, 1898, 30 Stat.

448, as amended by Act March 2, 1901, 31 Stat. 946, and supplemented by Act June 27, 1902, 32 Stat. 406, and as affected by Act April 12, 1902, c. 500, 32 Stat. 96 (U. S. Comp. St. Supp. 1911, p. 978), repealing the former acts, the repeal to take effect on July 1, 1902.

"In each case the legacies had been assessed for the gross amount thereof and the taxes had been paid under protest, and in each case the action had been brought by the respective defendants in error to recover the amount so paid on the ground that the tax had been unlawfully imposed and collected. The Court below held that the legacies were contingent beneficial interests and not vested, and rendered judgments for the defendants in error on the authority of *Vanderbilt* vs. *Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and the decision of this Court in *Lynch* vs. *Union Trust Co.*, 164 Fed. 161, 90 C. C. A. 147, and other cases. The legacies having been assessed in gross and upon the theory that the interests were vested, the decision in *Vanderbilt* vs. *Eidman* was deemed applicable. But in the recent case of *United States* vs. *Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, L. Ed.—, decided December 4, 1911, it was held that a legacy of property in trust to a trustee who was to pay the net income to the legatee in periodical payments during the latter's life is not a contingent interest, but a vested estate for life, and that it was assessable under the War Revenue Act of June 13, 1898, upon its value as ascertained with the aid of mortuary tables. On principle we think there can be no distinction between the estate of the beneficiary of such income of a legacy for life and that of the beneficiary of such income for a term of years, and on the authority of the decision last cited we must hold that in the case of *Muenter* vs. *Union*

Trust Co., and the case of *Muenter* vs. *Rosenfeld*, the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co., supra.* A complication arises from the fact that the defendants in error in framing the issues, relying as they did upon the proposition that the legacies were contingent, and not vested, and had been assessed at their gross value as if vested, did not question the assessments on the ground that the legacies had been overvalued, but, on the contrary, expressly acquiesced in the estimate 'for the purposes of this action.' We think they should not be precluded by those admissions from availing themselves of their just defenses to the assessments * * * The cases are remanded to the District Court, with leave to the parties to amend their pleadings and for further proceedings." (195 Fed. Rep. 480.)

John Rosenfeld died on May 28, 1902, leaving personal property in California. The repeal of the War Revenue Act took effect July 1, 1902, or 32 days after he died.

By his will, John Rosenfeld left certain legacies, six of which are involved in the present suit. After making certain bequests, not involved in case at bar, he created a trust for certain uses and purposes to last for *eleven years* from his death.

The will provided:

> "The said trust shall continue in existence for the period of eleven (11) years after my death, provided some one of my children herein named shall so long survive, otherwise the trust shall terminate upon the death of the last surviving of my said children."

The six legacies above referred to were assessed by the then Collector of Internal Revenue upon the theory that they had vested previous to the repeal of the War Revenue Act of June 13, 1898, which took effect on July 1, 1902, and each legacy was assessed at the clear value of $57,969.55, as follows:

(1) Legacy left in trust for Henrietta Rosner, a daughter..... $57,969.55;

(2) Legacy left in trust for Sarah Epstein, a daughter..... $57,969.55;

(3) Legacy left in trust for Lucy I. Weill, a daughter..... $57,969.55;

(4) Legacy left in trust for Max S. Rosenfeld, a son..... $57,969.55;

(5) Legacy left in trust for Louis Rosenfeld, a son..... $57,969.55;

(6) Legacy left in trust for Henry Rosenfeld, a son..... $57,969.55;

There is no dispute as to this assessed value of each legacy by the then Collector of Internal Revenue.

The then Collector of Internal Revenue imposed a tax on each one of these legacies of $652.15 upon the theory, as stated, that the legacies had vested in

possession and enjoyment of the beneficiaries prior to the repeal of the law on July 1, 1902.

The sum of $652.15 was the tax on each one of the six legacies of $57,969.55, being at the rate of $1.12½ for each $100.00 of $57,969.55, $1.12½ being the rate of tax, under the law, to a legatee of lineal issue where the legacy exceeded the sum of $25,000.00. Under the previous decision of this Court, affirming the judgment of the lower Court to that extent, the Collector of Internal Revenue had no right to assess, impose and collect the sum of $652.52 on each one of the six legacies left to the six beneficiaries above enumerated, for the reason that none of said legacies had vested in possession or enjoyment previous to the repeal of the law which took effect on July 1, 1902. But this Court further held, in its previous decision of this case, that the Collector of Internal Revenue should have assessed, imposed and collected a tax, not on the gross amount of the legacies, but on the "*value* of the *rights* to receive the *annual income* as determined in *United States* v. *Fidelity Trust Company,*" such value to be ascertained "with the aid of mortuary tables," and this case and another case were remanded to the Court below, "with leave to the parties to amend their pleadings and for further proceedings."

The complaint was accordingly amended to conform to the views of this Court and judgment prayed in the sum of $2,998.80 instead of $4,062.90, as demanded in the original complaint.

This sum of $2,998.80 is arrived at as follows: The gross or clear value of each one of the legacies left to each one of the six beneficiaries was the sum of $57,969.55. According to the official mortuary tables (see same as contained in "Compilation of Decisions," rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898, edition of January, 1899, pp. 195 to 199; also see the tables printed on the back of the "Legacy Return," Plaintiff's Exhibit No. 3 on retrial) the *"value* of the *rights* to receive the *annual income"* from the sum of $57,969.55, assuming money at four per cent in accordance with the official mortuary tables *for the period of eleven years,* would amount to $20,313.62.

In other words, according to the decision of this Court rendered on the previous writ of error, the Collector of Internal Revenue, as testified to by Frank H. Driscoll, the Internal Revenue official, should have assessed the clear *"value* of the *rights* to receive the *annual income"* derived from the sum of $57,969.55 at the sum of $20,313.62. He, therefore, should have assessed, imposed and collected a tax on the sum of $20,313.62, and not on the sum of $57,969.55, the latter being the gross or clear value of each legacy. (See testimony of Frank H. Driscoll, Transcript of Rec., pp. 47-49.)

The tax on $20,313.62 would, to a legatee of lineal issue, and being under the sum of $25,000.00, at the rate of 75 cents for each and every $100 of the $20,313.62, amount to $152.35.

In other words, each one of the six legatees or beneficiaries should have been assessed with a tax of $152.35 instead of $652.15, which was the amount they actually had to pay; and therefore, by virtue of the complaint as amended, judgment was asked for the difference between $652.15 and $152.35, or the sum of $499.80 as to each one of the six legacies, which aggregate the total sum of $2,998.80, the amount sued for under the complaint as amended.

Under the contention of counsel for defendant in error, which was sustained by the lower Court, if the *"value* of the *rights* to receive the *annual income"* are treated as *life estates* or *incomes for life,* the tax on each interest of each beneficiary computed "with the aid of mortuary tables" would be as follows:

"San Francisco, Cal., April 8, 1914. The Honorable, the United States District Court, San Francisco, California—Sir: The following data, the result of computation of the life interests of the principal legatees of the estate of John Rosenfeld, deceased, May 20, 1902, in income from the sum of $57,969.55, at 4 per cent, $2,318.782, are submitted:

To Henrietta Rosener, daughter, born May 4, 1860; age 42 years; amount taxable, $33,903.42; rate $1.12½; tax	$ 381.41
To Sarah Epstein, daughter; born June 2, 1861; age 40 years; amount taxable, $34,997.25; rate $1.12½; tax	393.72
To Louis Rosenfeld, son; born June 16, 1863; age 32 years; amount taxable, $36,020.45; rate $1.12½; tax	405.23

To Henry Rosenfeld, son; born June 22, 1865; age 36 years; amount taxable, $36,978.89; rate $1.12½; tax	416.01
To Lucy I. Weill, daughter, born August 16, 1869; age 32 years; amount taxable, $38,720.09; rate $1.12½; tax	435.60
To Max L. Rosenfeld, son; born May 8, 1873; age 29 years; amount taxable, $39,882.27; rate $1.12½; tax	448.74
Total tax	$2,480.71

"In computing the foregoing the annuity, or present value of one dollar due at the end of each year during the life of a person of specified age was, as to each, as follows:

"Henrietta Rosener, 42 years, $14,621.22; Sarah Epstein, 40 years, $15,092.95; Louis Rosenfeld, 38 years, $15,534.21; Henry Rosenfeld, 36 years, $15,947.55; Lucy I. Weill, 32 years, $16,698.46; Max L. Rosenfeld, 29 years, $17,202.25.

"Respectfully submitted,

F. H. Driscoll."

(See testimony of Frank H. Driscoll, Internal Revenue officer, Transcript of Record, pp. 53-55.)

Treating the taxable interest of each beneficiary to the annual income as a life estate or income for life, under the above computation, the defendant in error would be entitled to the aggregate tax of $2,480.71.

The amount of taxes actually paid by the plaintiff in error was $4,062.90, which included a tax of $150.00 on a legacy to Margitta Fisher, not considered then in controversy. The tax on the legacies here in question was, therefore, $3,912.90. Deducting the total tax of $2,487.71, under the view that the taxable interest of each beneficiary was a *life estate* or *income for life,* as was held by the lower Court, from $3,912.90, would leave $1,432.19, in which amount the Court below awarded judgment in favor of plaintiff in error.

The defendant in error introduced no testimony whatever. He relied upon two defenses, as follows:

First: That the tax should be computed on the income to each legacy just as if each legatee had been left a *"life estate"* by the terms of the will, instead of the period of *eleven years,* which is the time specifically provided for in the will.

The Court below, as stated, upheld this contention of the defendant in error, and it is to this erroneous view of the law that our writ of error is chiefly addressed.

The second ground of defense was:

That this action is governed by section 3226 and other sections of the Revised Statutes, providing a certain course of procedure to obtain a refund of taxes erroneously or illegally assessed or collected before suit can be maintained for the recov-

ery of such taxes, counsel for the defendant in error contending that such course had not been strictly pursued in this case.

The Court below rejected this view of the law as contended by counsel for defendant in error. (See opinion, Transcript of Record, pp. 56-60.)

It is to be noticed that defendant in error has acquiesced in this view of the law and has not sued out a writ of error.

ARGUMENT.

The assignment of errors directly raises the proposition whether the annual income for the period of ELEVEN YEARS, in law and for the purposes of taxation, should be treated and considered as an annual income FOR LIFE.

(See Assignment of Errors Nos. I-XI, Transcript of Record, pp. 63-70.)

The rulings of the trial Court, involving the above proposition, arose upon the offer of evidence on the part of both plaintiff in error and defendant in error.

(See Assignment of errors Nos. VII, VIII, and IX, Transcript of Record, pp. 65-69.)

While the Court, at the trial, reserved its final rulings upon the admission or rejection of the evidence of the Internal Revenue officer, Frank H. Driscoll, which directly raise the proposition above referred to, the Court subsequently allowed both sides the benefit of any and all exceptions to such adverse rulings.

(See Bill of Exceptions, Transcript of Record, pp. 48, 49, 50, 51, 53, 61.)

In determining the above proposition, there are two cardinal rules of interpretation that should constantly be kept in mind.

First: In a case of doubt or of ambiguity, "statutes imposing taxes are construed most strongly against the Government and in favor of

citizens or subjects, and that such statutes are not to be liberally construed."

Eidman vs. *Martinez,* 184 U. S. 878;
Lynch vs. *Union Trust Co.,* 164 Fed. 161, *163*;
Disston vs. *McLain,* 147 Fed. 114, *116-117.*

In the case of *Lynch* vs. *Union Trust Company, supra,* this Court, speaking through District Judge Van Fleet, said:

> "Primarily in this connection it is necessary to keep in view a cardinal principle, to be applied generally to the interpretation of legislation whereby the government seeks to impose a duty or burden upon the property or rights of the citizen in the nature of taxation, and more especially applicable to statutes such as this, seeking to impose a burden of a special or unusual character, and that is that, in all cases of doubt or ambiguity arising on the terms of such a statute, every intendment is to be indulged against the taxing power. This principle has been aptly stated in two cases involving the application of the statute under consideration: *Eidman* vs. *Martinez,* 184 U. S. 578, 583, 22 Sup. Ct. 515, 46 L. Ed. 697; *Disston* vs. *McLain,* 147 Fed. 114, 116, 77 C. C. A. 340."

Second: The practice of officials connected with any of the executive departments of the Government in applying certain laws and imposing taxes thereunder, while not controlling on this Honorable Court, yet is persuasive as to the views of these public officials in their practical application of the law.

As was well said by the Supreme Court of the United States in the case of *U. S.* vs. *Ala. R. R. Co.*, 142 U. S. 615-616, *622*:

> "We think the contemporaneous construction thus given by the executive department of the Government * * * a construction which, though inconsistent with the literalism of the Act, certainly comports with the equities of the case, should be considered as decisive in this suit."

And, again, the Supreme Court of the United States in the case of *U. S.* vs. *Finnell*, 185 U. S. *244*, 46 L. Ed. 890, *893*:

> "Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the Court to so adjudge. * * * But if there simply be doubt as to the soundness of that construction * * * the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons."

In the case of *New York* vs. *New York City R. Co.*, 193 N. Y. 543, 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or by public officers whose duty it was to enforce it, is entitled to great influence.

See, also, statement of the rule and cases collated in Vol. 36 Cyc., pp. 1139-1142.

In the case at bar, the Internal Revenue Officer treated the "*value* of the *rights* to receive the

annual income" for *eleven years,* the period of the trust, as the equivalent of an annuity for *eleven years,* and not, as was held by the Court below, as an income *for life.* (See testimony of Frank H. Driscoll, Internal Revenue Officer, Transcript of Record, pp. 48-49.)

Section 29 of the Act of June 13, 1898, c. 448 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307), so far as pertinent to the question here involved, is as follows:

> "That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, etc."

This section was repealed, to take effect July 1, 1902 (Act April 12, 1902, c. 500, Sec. 7, 32 Stat. p. 97 (U. S. Comp. St. Supp. 1907, p. 649), but all taxes or duties imposed thereby and the amendment thereto, prior to the taking effect of the repeal, were reserved from the operation thereof.

Subsequently, on June 27, 1902 (Act June 27, 1902, c. 1160, Sec. 3, 32 Stat. 406 (U. S. Comp., St. Supp. 1907, p. 652)), Congress passed an act, commonly known as the "Refunding Act," which authorized and directed the refunding by the Secretary of the Treasury, upon proper application, of all such taxes, "as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two," and provided that no tax should *thereafter* be assessed or imposed, under said war revenue act, "*upon or in respect to any contingent beneficial interest which shall not become vested in possession or enjoyment prior to said July first, nineteen hundred and two.*" This was the state of the legislation at the time the present action arose.

We now take up a discussion of the ultimate question presented to this Court for decision.

Is the right to receive the annual income for eleven years the same thing, in law and for the purposes of taxation, as the right to receive an annual income for life?

The learned Judge of the Court below held that it was. In his written opinion, he based this decision upon the following reasoning:

> "The will of Rosenfeld creating a trust to continue for *eleven years,* during which period the beneficiaries were to receive the annual income, and at its expiration the principal or corpus of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the in-

> come for the definite *term of eleven years;* defendant, on the other hand, contending that the vested interests of each was to the income *for life,* since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. *The latter is, I think, the correct construction.* It is not a case where, at the termination of the trust period, the right to receive the income might, on the happening of some contingency, pass to some one other than the beneficiary, but where, by the vesting of the corpus of the legacy at the termination of that period the right to the income would still remain for life." (Italics ours.)

It is significant that no authorities are cited by the learned Judge of the Court below in support of his views; nor does counsel for defendant in error produce any. We will, on the other hand, refer to a number of authorities from the U. S. Supreme Court and Circuit Court of Appeals, which will clearly establish the erroneousness of the position taken, in this respect, by counsel for defendant in error and by the learned Judge of the Court below.

That portion of the will, which is pertinent to the question presented for decision, provides: "The said trust shall continue in existence for the period of eleven (11) years after my death, *provided some one of my children herein named shall so long survive, otherwise the trust shall terminate upon the death of the last surviving of my said children."*

The contingency was ever present that any one of the children might die before the expiration

of eleven years; that one, or more, or all might die. The legacies themselves, as held by this Court in its previous decision, could not be taxed because they were *contingent* legacies, the contingency being ever present that the beneficiaries might die before the expiration of the eleven year trust period. If the corpus of the legacy could not be taxed because of its contingent nature, upon what theory can counsel for defendant in error contend, and the Court below maintain, that a tax should be imposed on the income to be derived from such contingent legacy *after* the time has expired for the contingency to happen? If the corpus of the legacy could not vest until after the repeal of the law, how could any income, to be derived from such corpus *after* eleven years had expired, be deemed vested and taxable previous to the repeal of the law, the contingency ever being present that one, or more, or all, of the beneficiaries might die before the expiration of the eleven years and they would get neither corpus nor income? It is one thing to subject to taxation the present "*value* of the *rights* to the *annual income*" for *eleven years,* which present right had vested previous to the repeal of the law on July 1, 1902; it is quite another thing to endeavor to subject to taxation, not only the present "*value* of the *rights* to receive the *annual income*" for *eleven years,* but also the "*value* of the *rights* to receive the annual income" *after* the eleven years have expired. In the first instance, the law deems the *present right* to receive the annual income for eleven years as having vested

previous to the repeal of the law on July 1, 1902; in the latter instance, neither right to the corpus of the legacy nor to any annual income to be derived therefrom could vest until the eleven years had expired, which would be long after the repeal of the law on July 1, 1902.

While counsel for the defendant in error frankly concedes that a trust for eleven years is not a trust for life, he set up the fatuous and fallacious argument, in his reply brief in the Court below (and, we assume, will repeat that argument before this Court), that "by the terms of the will, the trust postponed possession and enjoyment of the *res* for a period of *eleven years,* so that that did not vest at the death of the legatee; but that as to the right to the enjoyment and possession of the income thereof that vested immediately and continued for the *life* of the legatee."

What counsel for the defendant in error concedes cannot be done *directly,* we submit should not be permitted to be done *indirectly.* If, as is admitted, a trust for eleven years is not a trust for life, then, obviously, the annual income from a trust of *eleven years* cannot be the equivalent of the annual income of a trust *for life.* Would counsel maintain the absurd and illogical proposition that the annual income from a trust for one year, or two years, or three years, or eleven years, is tantamount to the annual income from a trust for life? Is counsel for defendant in error not aware of the fact that the method of computing

an annual income for a *term of years* is entirely different from computing the income to be derived from a trust *for life?* In the one case, the *age* of the legatee is all important; in the other case, that of an annuity, *it is immaterial,* the *sole question* being the *number of years.* In the case at bar the *number of years is eleven.* The methods of computation between the income of a *life estate* and of an annuity, *for eleven years,* are entirely different, as shown by the official mortuary tables, and the former bears a different and heavier burden of taxation than does the latter. This is recognized officially by the Commissioner of Internal Revenue, for, on the back of the "Legacy Return" (Plaintiff's Exhibit No. 3 on Retrial), will be found two separate sets of official mortuary tables, one to compute the *annual value* of a *life interest* of a person of *specified age,* and the other to compute the *annual value* for a *certain number of years.* (See, also, same mortuary tables officially promulgated in "Computation of Decisions," Plaintiff's Exhibit No. 2, Transcript of Record, p. 48.)

Although each of the six legacies, in the case at bar, amounted to the same sum, to-wit: $57,969.55, still, if they were treated as life estates or incomes for life, as held by the Court below, the taxes upon the income on each legacy, computed with the aid of mortuary tables, would vary according to the age of each beneficiary. (See testimony and computations of Frank H. Driscoll, Transcript of Record, pp. 53-55.) But, if treated as an annuity for eleven

years, the income from each legacy of $57,969.55, computed with the aid of mortuary tables, would bear the same tax irrespective of the different ages of the beneficiaries.

The will of the decedent, John Rosenfeld, specifically limited the period of the trust to *eleven* years. The income thereof was to be paid to the beneficiaries *for a period of eleven years and no more.* The will in the case at bar did not purport to give any one of the six beneficiaries a life estate or income for life. In this respect, the will in the case at bar differs from the will involved in the case of *United States* vs. *Fidelity Trust Co.,* 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. ——. In that case, it was held that a legacy of property in trust to a trustee who was to pay the net income in periodical payments during the latter's *life* is not a contingent interest, but a vested interest *for life* as to *the income.*

How counsel for defendant in error can confound or confuse a *life estate or interest* with one for a *mere term of years* is inexplicable to us! How counsel can prolong or elongate a trust for *eleven years* to one for *life* is something quite incomprehensible to us! By what law, authority, reason, rule of logic, common sense, or mathematics, counsel can justify such a contention baffles even our ordinary comprehension! Upon what fiction of law, resurrected even from the antiquated and barbarous mazes of the common law, counsel for defendant in error can base the contention that an estate or

income for eleven years is tantamount to an estate for life, arouses even our cupidity!

The previous decision of this Circuit Court of Appeals in this case does not bear out his contention, nor does a comparison of the wills involved in this case and in the case of *United States* vs. *Fidelity Trust Co., supra.*

The syllabus of the opinion of this Circuit Court of Appeals in this case completely refutes any such theory as that advanced by counsel for defendant in error, to the effect that a trust for *eleven years* is tantamount to a *life estate or interest.* It reads:

> "A legacy in trust to a trustee, who is to pay the net income to the legatee for a *term of years* until distribution, creates a vested interest in the beneficiary in such income *for the term,* which is assessable under War Revenue Act June 13, 1898, c. 448, Sec. 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, Sec. 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, Sec. 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983), if it became vested before July 1, 1902, and amounted to $10,000.00."

We have italicized the words "term of years" and "for the term."

In the opinion of this Circuit Court of Appeals this language is used:

> "On principle we think there can be no distinction between the estate of the beneficiary of such income of a legacy *for life* and that of a beneficiary of such income for a *term of years,* and on the authority of the decision last

> cited we must hold that in the case of *Muenter* vs. *Union Trust Co.,* and the case of *Muenter* vs. *Rosenfeld,* the rights of the beneficiaries to receive the income of the legacies *were rights* which were *vested* at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the *annual income."* (195 Fed. Rep. 480, *482.*)

The last two words used by the Circuit Court of Appeals, viz.: "annual income," refer to what? Ostensibly and undoubtedly to the annual income for *eleven years.* This Court of Appeals was considering whether the rights to receive the income of the legacies were *vested* prior to the repeal of the law on July 1, 1902. This Court held, as stated by it, that "the rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacy, but upon the value of the rights to receive the *annual income."*

We fail to see where counsel for defendant in error gets the slightest authority from the decision of this Circuit Court of Appeals in this case, justifying the position he now takes that a trust *for eleven years* is tantamount to a trust for *life;* or that a trust for a *mere period of years* and a *life estate* are practically convertible terms.

The legacy in gross was not subject to tax because it was not vested in possession and enjoyment

previous to the repeal of the law, which took effect on July 1, 1902. This the Circuit Court of Appeals has so held. The only thing that could have been taxed previous to the repeal of the law on July 1, 1902, according to this Circuit Court of Appeals, was the "*value* of the *rights to receive the annual income.*" But this *annual income* could last only *eleven years.* It was not an annual income *for life.* And the contingency was ever present that some one, or more, or all, of the beneficiaries might die before the end of the eleven years.

The rights of the Government and of the tax-paying citizen must be determined as of the time when the repeal took effect, viz.: *on July 1, 1902,* and not as of today. On July 1, 1902, the decedent had been dead but 32 days. It appears that the Collector of Internal Revenue made no assessment or collection of taxes on the legacies involved in the case at bar until over a year afterwards, to-wit: *July 29, 1903.* But, as held by this Circuit Court of Appeals, the *right* to receive the annual income *vested* prior to the repeal of the law on July 1, 1902. This right vested at the time of the death of the decedent on May 28, 1902, 32 days before the repeal of the law took effect on July 1, 1902. *It was this right that was made subject to a tax.* It was a right to the *annual income for eleven years and no more.* It was not a right to any annual income *for life* or for any other period of time than *eleven years.* The official mortuary tables promulgated by the Commissioner of Internal Revenue make special provision for

annuities of the character involved in the case at bar. The particular table applicable to the case at bar will be found printed on the back of the Legacy Return at the upper right hand corner of the outside page. (See also "Compilation of Decisions," "Exhibit No. 2-a.")

The witness Frank H. Driscoll, who testified and who has been connected as Internal Revenue officer with the Government for now nineteen years and a half and who has had special experience in regard to the assessment of taxes on legacies, stated that the interest or right to annual income subject to tax upon the legacies in question was considered by him as an *annuity* and so treated. He testified on cross-examination:

> "Q. Mr. Driscoll, you are basing your valuation of the interests passing to each of these legatees upon the assumption that they only get the income for eleven years. Is not that true?
>
> A. *It is an annuity, yes.*
>
> Q. *An annuity for eleven years?*
>
> A. Yes. (See Transcript of Record, p 49.)

On direct examination, he testified as follows:

> "Q. Mr. Driscoll, will you state to his Honor what would be *the value of the right to receive the annual income from this $57,969.55;* in other words, *what sum would you tax as a Government officer?*
>
> A. $20,313.62.
>
> Q. *That would be so as to each legacy?*
>
> A. *Yes; each of the six.*

Q. *And what is the rate of tax?*

A. *75/100 of 1%; 75c on each $100.*

The Court: Q. *The amount, you say, would be $20,313.62?*

A. *Yes, sir.*" (Transcript of Record, p. 49.)

It is respectfully submitted that the practice followed by an experienced officer of the Government in the matter of the assessment of taxes on legacies, while not conclusive upon questions of law, still is very persuasive as indicating the views of the law followed by such officer in the assessment of these taxes on legacies. In other words, the Internal Revenue officer, when called upon to assess, in the case at bar, a tax upon the "*value* of the *rights* to receive the *annual income*" treated such right as an annuity for *eleven years* and not as a *life estate or interest,* as is now contended by counsel for defendant in error.

The United States Supreme Court and other Federal Courts fully sustain us in the views we here advance.

The decision and reasoning in the leading case of *Vanderbilt* vs. *Eidman,* 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, is diametrically opposed to the views and judgment of the lower Court in this case.

In the Vanderbilt case, as in the case at bar, the beneficiary of the trust there created was to get the income for a certain period of time, to-wit: until he should attain a certain age (in the case at bar, after

the expiration of eleven years), after which he was to come into possession of one-half of the estate. It was sought in that case, as in the case at bar, not only to tax the "*present right* to receive the income of such estate until he attains the age of thirty years," but to tax the income *after* he should have attained the age of thirty years, or, in effect, the income *for life*. The Supreme Court of the United States, in an elaborate opinion, held that not only could the corpus of the legacy not be taxed because of its contingent nature but that the income to be derived from such contingent legacy could not be taxed, "with the exception of his *present* right to receive the income *until* he attains the age of *thirty years.*" (See language of question III certified by the Circuit Court of Appeals to the Supreme Court of the United States, *Vanderbilt* vs. *Eidman,* 196 U. S. 48 O, ——, 49 L. Ed. 563, *565.*)

In other words, the Supreme Court of the United States held, in the Vanderbilt case, that nothing could be taxed after the repeal of the War Revenue Act, which took effect on July 1, 1902, "with the exception of his *present right* to receive the income of such estate *until* he attains the age of *thirty years.*"

Applying that decision to the case at bar, we respectfully submit that nothing could be taxed against any of the beneficiaries under the trust created by the will of John Rosenfeld, "with the exception of their *present rights* to receive the

income of such estate *until* the expiration of eleven years." (Paraphrasing the language of United States Supreme Court in the Vanderbilt case.)

The facts of the Vanderbilt case, as set forth in the statement of the case by Mr. Chief Justice White, show the direct applicability of that decision to the case at bar:

After setting forth that portion of the will creating the trusts, the learned Chief Justice stated:

> "All of the children of Cornelius Vanderbilt, named in the seventeenth clause of his will, were living at the time this suit was brought. At the time of the death of Cornelius Vanderbilt his son Alfred G. Vanderbilt was between *twenty-two and twenty-three years of age,* and his son Reginald C. Vanderbilt was between nineteen and twenty years of age, and both were unmarried.
>
> The appraised value of the residuary personal estate at the time of the testator's death was $18,972,117.46.
>
> The right of Alfred G. Vanderbilt to the beneficial enjoyment, as provided in the will until he became *thirty years of age,* was appraised at $5,119,612.43, and upon this sum the executors paid a death duty under Secs. 29 and 30 of the Act of June 13, 1898 (30 Stat. at L. 464, Chap. 448, U. S. Comp. Stat. 1901, pp. 2307, 2308), at the rate of 2½%, the tax amounting to $115,191.28. After payment of this amount, and subsequently to the passage, on March 2, 1901 (31 Stat. at L. 946, Chap. 806, U. S. Comp. Stat. 1901, p. 2307), of an amendment to the War Revenue Act of 1898, the Commissioner of Internal Revenue, considering

that by that amendment Alfred G. Vanderbilt had become *immediately liable for a tax on his right to succeed to the whole residue if he lived to the ages of thirty and thirty-five years respectively,* assessed a death duty based upon that hypothesis. In making this assessment, *as by the mortality tables it was shown that Alfred G. Vanderbilt had a life expectancy beyond the ages of thirty and thirty-five years,* the commissioner assessed *the interest as a vested estate equal in value to the sum of the entire residuary estate; viz.: $18,972,117.46.* Upon this valuation a tax was levied of 2½ per cent, producing $426,872.64. On this amount, however, credit was allowed for the sum of the tax previously paid, leaving the balance due $311,681.36. On September 3, 1901, this balance was paid by the executors under protest, 'and upon compulsion of the collector's threat of distraint and sale.' The executors thereupon made the statutory application to the commissioner of internal revenue for the refunding of the amount, and, it being refused, commenced in the Circuit Court of the United States for the Southern District of New York this action to recover the payment.

The facts, as above stated, were averred and the right to recover was based upon the ground that *as Alfred G. Vanderbilt only had the enjoyment presently of the revenues of the residuary estates up to the period when he might attain the age of thirty years, he was only liable to be assessed upon that beneficial interest. For this reason it was charged that the assessment made of the bequest of Alfred G. Vanderbilt of the whole residuary estate, upon condition that he reached the ages of thirty and thirty-five years respectively, was unwarranted.*

The Circuit Court, on the ground that the complaint did not state a cause of action, sus-

> tained a demurrer to that effect filed by the Government, and dismissed the action. 121 Fed. 590. The Circuit Court of Appeals stated the facts as above recited, and certified certain questions."

The question certified by the Circuit Court of Appeals in the Vanderbilt case, and upon which the Supreme Court based its decision, was as follows:

> "III. Did Secs. 29 and 30 of said Act authorize the assessment and collection of a tax with respect to *any* of the *rights* or *interests* of Alfred G. Vanderbilt as a *residuary legatee* of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, *with the exception of his present right to receive the income of such estate until he attains the age of thirty years,* prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?" (Italics ours.)

This question was answered in the negative. In other words, the Supreme Court held that no taxes "with respect to *any* of the *rights* or *interests* of Alfred G. Vanderbilt as a *residuary legatee,* could be imposed or assessed *with the exception of his present right to receive the income of such estate until he attains the age of thirty years.*" (See language of question certified No. III as above quoted.)

The Supreme Court decided that the reversionary interests could not be taxed because they were contingent upon the beneficiary being alive at the expiration of the respective periods of the trusts, to-wit: the ages of thirty and thirty-five years re-

spectively; and it held, further, that not *any* of the *rights* or *interests* of the beneficiary, to-wit: the rights to receive the *annual income* to be derived from the trust estate *after* the beneficiary had attained the ages of thirty and thirty-five respectively, could be taxed, and it laid down the rule that the *only right or interest* that could be taxed was *"his present right to receive the income of such estate until he attains the age of thirty years,"* and that the income to be derived from the estate between the ages of thirty and thirty-five, at which latter period he was to get the balance of said estate, could *not be taxed.* The Supreme Court did not hold, in the Vanderbilt case, that the *"present right to receive the income of said estate,"* extends to or was prolonged beyond the period of the trusts, and was, in effect, a *"present right to receive the income of such estate" for life,* simply because (to use the language of the trial Judge in his opinion, Transcript of Record, p. 60) "the vested interests of each (beneficiary) was to the income for life, *since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives."*

The reasoning and decision in the Vanderbilt case completely supports the contention made by us in the Court below and now advanced upon this writ of error.

If the right to receive the annual income for *eleven years* is the equivalent of the right to receive

it *for life,* as was held by the learned Judge of the Court below, why did not the United States Supreme Court, in the Vanderbilt case, hold that not only was the "*present right* to receive the income of such estate *until* he attains the age of *thirty years*" *taxable,* but also the right to receive the income *thereafter or for life,* inasmuch as Alfred G. Vanderbilt was, according to the terms of the will in that case, as in the case at bar, to inherit the rest of the estate?

Why did not the United States Supreme Court, in the Vanderbilt case, treat the *present right* to income *for years* as the equivalent of the *present right* to income *for life,* as did the trial Court in the case at bar, if it be the law that the *present right* to receive an income for a *few years* is the equivalent of the *present right* to receive an income *for life?*

In the Vanderbilt case, as in the case at bar, the will provided that at the expiration of the several periods of trusts, the beneficiary should come into actual possession and enjoyment of his legacy, which is the only reason given by the learned Judge of the Court below for holding that an estate for *eleven years* is the equivalent for the estate *for life,* for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented.

In the Vanderbilt case, the beneficiary Alfred G. Vanderbilt was to get the income *until* he arrived at the age of *thirty years,* when he was to be put

in full possession of one-half the portion of the estate left to him, and thereafter he was to receive the income from the other half of the estate *until* he attained the age of *thirty-five years,* and yet the Supreme Court of the United States held that the income from the second half of the estate to be paid Alfred G. Vanderbilt *after* attaining the age of *thirty years* and *until* he should attain the age of *thirty-five years* was *not subject to taxation,* which is directly contrary to the rationale of the decision of the lower Court in this case. The Supreme Court held that the only interest that was subject to taxation, previous to the repeal of the law on July 1, 1902, was the "*present* right to receive the income of such estate *until* he attains the age of *thirty years.*

This is precisely what we contend in the case at bar. We contend that the only interest or right subject to taxation, in the case at bar, if any interest was taxable at all, was the *present right* to receive the *annual income* for *eleven years;* that, and no more.

This view of law, as declared in the Vanderbilt case, was expressly recognized in the subsequent case of *United States* vs. *Fidelity Trust Company,* 222 U. S. 158, where the United States Supreme Court said:

> "*Vanderbilt* vs. *Eidman,* 196 U. S. 480, 49 L. Ed. 563, 25 Sup. Ct. Rep. 331, concerned a life estate in remainder, which, whether the remainder was technically vested or contingent

(*Ibid.* 501, 502), was not vested in possession or enjoyment. *It was assumed that the tax was payable in a case like this. Ib. 488, 495.*"

The case of *United States* vs. *Fidelity Trust Company* involved an estate *for life,* not a trust for merely *eleven years,* which differentiates it from the case at bar as to the facts, and it was properly held in that case, following the reasoning in the Vanderbilt case, that the *present right* to receive the quarterly yearly income having attached or vested a considerable time previous to the repeal of the law on July 1, 1902, the income *for life* was taxable, to be computed with the aid of the official mortuary tables.

The Vanderbilt case did not involve a *life estate* or *income for life* but, as in the case at bar, an estate or income *for years.* Alfred G. Vanderbilt was to receive the annual income upon one-half of the trust estate willed him until he should attain the age of *thirty years,* at which time he would receive one-half of the estate, and thereafter the annual income upon the other half of the trust estate *until* he should attain the age of *thirty-five* years, when he would receive the other half and balance of the estate. As above stated, the Supreme Court held that his interest, for the purposes of taxation, was not an estate *for life* or *income for life* (as was erroneously held by the trial Court in the case at bar), but was the *present right to receive the income of such estate during the period of the trust, and no longer.*

According to the Vanderbilt case, as recognized and followed in the later case of *United States* vs. *Fidelity Trust Company,* both of which cases are directly applicable, as to the law, to the case at bar, the *only* taxable interest in the case at bar, if there be any taxable interest at all, was the *present right* to receive the *annual income* for *eleven years,* and no longer, said interest to be computed with the aid of the official mortuary tables.

There was the ever present contingency in the case at bar, as in the Vanderbilt case, that the beneficiaries might die before the trust periods had expired, which feature of the case seems to have been entirely ignored by the learned Judge of the Court below.

As already stated, the rights of the taxing power and of the tax-paying citizen are to be determined and fixed as of the date when the repeal of the War Revenue Act took effect, to-wit: on July 1, 1902, and not as of a later date, or as of the present time. After July 1, 1902, no further taxes could be imposed or assessed under the War Revenue Act of June 13, 1898, as amended and supplemented. No taxes could be collected after July 1, 1902, except those that came clearly within the saving clause of the Repealing Act and those that did not come within the scope of the Refunding Act of June 27, 1902. At the time that the repeal took effect, on July 1, 1902, the only right or interest of the beneficiaries, in the case at bar, which was subject to taxation, if any interest at all was subject to

taxation, was the *present right* to receive the *annual income* from the trust estate for the period of *eleven years,* the clear value of which right or interest was to be ascertained by computation with the aid of the official mortuary tables.

The case of *Herold* vs. *Shanley,* 146 Fed. 20, also strongly supports the views we here advance. That was a decision by the Circuit Court of Appeals for the Third Circuit. The syllabus succinctly states the facts of that case and the doctrine we here invoke, as follows:

> "Testator bequeathed $100,000 to his executor in trust to pay the income for the support and education of testator's grandson until he should arrive at the age of twenty-one years, when the sum was to be paid to such grandson, etc. *Held,* that such legacy was not vested prior to the grandson's arrival at age, and hence the only portion thereof which in the meantime was taxable under War Revenue Act, June 13, 1898, c. 448, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, 31 Stat. 948 (U. S. Comp. St. 1901, pp. 2307, 2308), and Act June 27, 1902, c. 1160, 32 Stat. 406 (U. S. Comp. St. Supp. 1905, p. 449), was the amount he would *probably receive before reaching majority.*"

A reading of the instructive opinion of the Circuit Court of Appeals for the Third Circuit will disclose that it took the same view of the decision of the Supreme Court of the United States in the case of *Vanderbilt* vs. *Eidman, supra,* as to the non-taxability of the income from any interests *after* the expiration of the trusts, which we here maintain.

In that case, as in the case at bar, a trust was created for a temporary period and the income was to be paid to the beneficiary for a limited time, to-wit: until the grandson should reach his majority (in the case at bar, for eleven years), at which time he was to receive the legacy for life (in the case at bar, at the expiration of eleven years the beneficiaries were to receive their legacies for life). The same contention was made in that case as is here advocated by counsel for defendant in error. But the Circuit Court of Appeals for the Third Circuit held that the only taxable interest was that portion of the income which the grandson would *probably receive before reaching majority,* said income to be computed with the aid of the official mortuary tables.

Other decisions, to the same general effect, are:

Ward vs. *Sage,* 185 Fed. 7;
Disston vs. *McLain,* 147 Fed. 114;
Lynch vs. *Union Trust Co.,* 164 Fed. 161.

In view of the above authorities, we respectfully submit that the reasons given by the Court below, and now sought to be upheld by counsel for defendant in error, imposing a legacy tax upon an annual income for *eleven years* just as if the annual income were *for life,* are not sound and cannot be supported in law, and that the judgment of the lower Court, in that respect, must be reversed.

A consideration of the provisions of the Refunding Act of June 27, 1902 (32 Stats. L. 406), as

applied to the case at bar, clearly exposes the fallacy of the contention made by counsel for defendant in error and of the reasoning of the Court below in this connection.

The present suit is specially authorized by the provisions of Section 3 of the Act of June 27, 1902 (32 Stats. L. 406), which authorizes a recovery on "*so much of said tax* as may have been collected on *contingent beneficial interests* which shall not have become vested prior to July 1, 1902."

The present suit is brought to recover "*so much of said tax* as may have been collected on *contingent beneficial interests*" in the Rosenfeld estate.

"So much of said tax" on said contingent beneficial interests, which it is the purpose and object of the complaint as amended to recover, aggregates the sum of $2998.80, not including accrued interest and costs.

Counsel for defendant in error seems to confuse and confound this suit, which is brought to recover "*so much of said tax* as may have been collected on contingent beneficial interests" in the Rosenfeld estate, with what he is pleased to term an over-valuation. There is no question of over-valuation in the case at bar. The only purpose of this suit is to recover, "*so much of said tax* as may have been collected on contingent beneficial *interests*" in the Rosenfeld estate (using the language of the Refunding Act of June 27, 1902).

"So much of said tax" is represented by the difference between the sum of $652.15 (the tax actually levied on the contingent beneficial interests in the Rosenfeld estate, by the then Collector of Internal Revenue) and the sum of $152.35 (the tax which the Collector of Internal Revenue should have assessed on the clear "value of the rights to receive the annual income" derived from the contingent beneficial interests in the Rosenfeld estate, as previously held by this Court). This difference between $652.15 and $152.35 amounts to the sum of $499.80 on each legacy. There were six legacies or contingent beneficial interests in the Rosenfeld estate, which taxed at $499.80 each would aggregate the total sum of $2,998.80, the amount sued for under the complaint as amended.

It is thus seen, from these figures, which are of record and were testified to by the Government expert, Frank H. Driscoll, an Internal Revenue officer of long experience with the Government in the collection of war legacy taxes, that the object and sole purpose of the complaint as amended is to recover "*so much of said tax* as may have been collected on contingent beneficial interests" in the Rosenfeld estate.

There is no question of any over-valuation in the case at all and to import such an argument into the case is to inject a false issue. The Collector of Internal Revenue valued and assessed the six contingent beneficial interests at $57,969.55. No

one complains about that valuation and that remains the valuation of the six contingent beneficial interests to this day, and is the sum, upon which the Circuit Court of Appeals has held that the "value of the rights to receive the annual income (from said sum of $57,969.55) as determined in *United States* vs. *Fidelity Trust Co.,*" "with the aid of mortuary tables," is to be assessed and collected.

This is not a case of over-valuation, as is ingeniously suggested by counsel for defendant in error, but it is simply and nothing more than a mere computation as to what tax the Collector of Internal Revenue should have assessed and collected on the clear "value of the rights to receive the annual income" from each contingent beneficial interest in the Rosenfeld case, which contingent beneficial interest was assessed by said Collector at $57,969.55 and was and is the sole and only basis upon which to compute the "value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co.,*" "with the aid of mortuary tables" from each of said contingent beneficial interests assessed by the then Collector at $57,969.55.

As a matter of fact, the Collector of Internal Revenue has never at any time made any assessment whatever, under the rule announced by the Circuit Court of Appeals to this Circuit, of the "value of the rights to receive the annual income" from such

contingent beneficial interest of $57,969.55. How, then, can there be any question of over-valuation? Even if there were, it could not affect the right of plaintiff in error to recover "*so much of said tax* as may have been collected on contingent beneficial interests" under the Refunding Act of June 27, 1902.

Using the mortuary tables, as officially contained in "Compilation of Decisions" rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898, Edition of January, 1899, pp 195 to 199 (also see the same tables printed on the back of the "Legacy Return," Plaintiff's Exhibit No. 3 on Retrial), we find that the "value of the rights to receive the annual income" from the sum of $57,969.55, assuming money at 4 per cent in accordance with the official mortuary tables, for a period of eleven years, would amount to $20,313.62 each. In other words, the six contingent beneficial interests of $57,969.55 would produce, according to the mortuary tables, annual incomes during eleven years aggregating $20,313.62 each. It is, therefore, this latter sum, *representing the value of the annual income for the period of eleven years,* that the Collector of Internal Revenue should have assessed and collected a tax on assuming he had a right to impose or collect any tax whatsoever. The tax on this annual income, as computed by the Government officer in accordance with the war tax rates, amounts to the sum of $152.35 as to each one of the six beneficiaries. It is this sum that represents the "value

of the rights to receive the annual income" derived from the sum of $57,969.55, computed according to the official mortuary tables. The difference between the tax of $152.35, which, under the previous decision of this Court in this case, it was held the defendant in error should retain, and the tax of $652.15, which we were compelled to pay on the contingent beneficial interests, represents, obviously, "*so much of said tax*" as was collected on contingent beneficial interests in the Rosenfeld estate. This difference between $652.15 and $152.35 amounts to $499.80 as to each one of the six legacies, all of them aggregating the total sum of $2,998.80, the amount sued for under the complaint as amended.

Having made it clear that the sole and only purpose of the amended complaint is to recover "*so much of said tax*" as was collected on the six contingent beneficial interests in the Rosenfeld estate, it follows that the case comes squarely within the ruling of the Honorable Attorney General. (See Opinions of Attorney General, Vol. 26, p. 194, *197, 198*), in which he held that actions for the recovery of taxes under the "Refunding Act" of June 27, 1902, were of a special character and that claims to refund legacy taxes were not governed or subject to the provisions of Section 3226, 3227, 3228 of the Revised Statutes, requiring the presentation of claims, etc.

The case of *Thacher* vs. *United States,* 149 Fed. 902, is also directly in point and in consonance with the ruling of the Attorney General.

The learned Judge of the Court below, in holding that this was not a case of overvaluation nor a case governed or subject to the provisions of Section 3226 *et seq.* of the Revised Statutes, requiring presentation of claims etc., used the following language:

> "The defendant strenuously contends that the theory upon which plaintiffs have proceeded is erroneous; that, under the decision of the Circuit Court of Appeals, that section furnishes no basis for recovery; that the Court, having held that, to the extent of the annual income, the rights given plaintiffs under the will were vested rights, it results that the tax collected must be regarded as one involving a mere overvaluation of such vested interests, and that the right of the plaintiffs to recover, if at all, is governed by the provisions of Sections 3226, 3227 and 3228 of the Revised Statutes, to the requirements of which the plaintiffs' proofs have not conformed.
>
> But I am of opinion that this contention involves a misapprehension of the remedial scope of Section 3 and a failure to fully appreciate what the Refunding Act was intended to accomplish. Its evident purpose was, as an act of justice by the Government, to provide a means to restore to the citizens moneys to which the Government was not entitled, but which he had been required to pay, by reason of a misconstruction by the revenue officers of the provisions of the War Revenue Act, and as to the recovery of which the existing statutes afforded no adequate remedy; and that it was intended to cover all instances where, as a result of the administration of that Act, taxes had been to any extent illegally or unjustly assessed and collected is, I think, from its comprehensive language, quite obvious. By its very terms it contemplates that the tax may have been to

some extent properly assessed, as being based upon a vested interest, and hence the provision that only to the extent that it exceeds such basis shall it be refunded; that is, '*so much* of said tax as may have been collected on contingent, beneficial interests which shall not have become vested.' The present case falls clearly within the scope of the Act. It matters not whether we say the assessment was erroneous because an over-valuation of vested interests, or because one made wholly upon interests which had not vested. Either is within the wrong Congress intended to redress, and both are equally within the remedial provision of the statute. Nor does the decision of the Circuit Court of Appeals operate to take the case out of the provisions of this Act. That Court clearly indicates by its opinion that, while the tax as assessed was in part based upon vested rights subject to the Revenue Act, it covered interests which were not so vested, and that, as to such excess, plaintiffs should be entitled in this action to recover.

This construction is in harmony with that of the Department of Justice. In his opinion rendered to the Secretary of the Treasury for his guidance as to the scope and purpose of the Act of June 27, 1902, the learned Attorney General says:

> 'The provisions of the Act are special, and apply to a particular class of obligations against the Government. Being special, these claims are not governed by the provisions of the prior general statute. (R. S. Sec. 3228.) Suits brought to recover money due under this Act are not actions for the recovery of taxes, but for money held by the Government in trust for the benefit of the parties to whom it rightfully belongs. The Act by its terms, creates

and acknowledges the obligation of the Government. A method is prescribed by which each party can secure the money belonging to him whenever he wishes it. No time has been fixed by any rule of the Secretary of the Treasury, which has been called to my attention, within which a claimant must apply for it, or after which the money is forfeited to the Government. It is, therefore, an obligation payable on demand, and the statute of limitations does not begin to run until there has been a refusal to pay, or something equivalent thereto. (*U. S.* vs. *Wardell,* 172 U. S. 48.)

'It will be observed that under the provisions of this statute Congress has granted a right of repayment regardless of any conditions that may have heretofore operated as a bar to such repayment. The statute is an acknowledgment by Congress of a supposed moral obligation; a provision as a bounty of the Government. Whether or not the taxes were originally paid under protest is eliminated, and the question of voluntary or involuntary payment is immaterial.'

—Op. Atty. Genl. Vol. 26, p. 194.

See also

Thatcher vs. *U. S.,* 149 Fed. 902."

(See Transcript of Record, pp. 57-60.)

Furthermore, the action of the then Collector of Internal Revenue, in imposing, assessing and collecting "so much of said tax" on each one of the six contingent legacies left to the six beneficiaries under the trust created by the last will and testament of John Rosenfeld, deceased, was in violation of the last paragraph of Section 3 of the Act of

June 27, 1902, which forbids the assessment or imposition, after the passage of the Act, "upon or in respect of any *contingent beneficial interests* which shall not become absolutely vested in possession or enjoyment prior to said July 1, 1902."

The imposition of the tax of $499.80 on each one of the six legacies by the then Collector of Internal Revenue was directly contrary to this inhibition of the statute. The statute was enacted on *June 27, 1902,* and the taxes in the case at bar were assessed, imposed and collected by the then Collector of Internal Revenue on *July 29, 1903,* or *more than one year* after the passage of the Act of June 27, 1902.

As was well said by Judge Morrow, in the case of *Union Trust Co.* vs. *Lynch,* 148 Fed. 49, 54:

> "The tax was repealed on July 1, 1902, and after the decree was entered in this case on June 26, 1901, the law itself was only in existence one year and four days, and this statute says specifically that when it is not vested at the time the repealing statute went into effect *no tax shall be collected;* that is, then the specific command of this statute is that unless a person receives a legacy of more than $10,000.00 which vests in the absolute possession and enjoyment of such person *prior* to the passing of this repealing act, *there can be no tax.* That is a *specific, direct, positive, unqualified direction* of the statute, which the Court *cannot evade.*"

In that case, it was held that where the legatees of a testator were to receive only the income from their respective shares in the estate until they reached *stated ages,* which did not occur in any case until

after July 1, 1902, when the repeal of the War Revenue Act took effect, the interest of such legacies for the purpose of taxation was the value of the income received by each respectively from the estate *prior* to said July 1, 1902, providing said income amounted to more than $10,000.00.

This decision was affirmed by the Circuit Court of Appeals for this Circuit, District Judge Van Fleet delivering the opinion of this Court.

> See *Lynch* vs. *Union Trust Co. of S. F.,* 164 Fed. 161.

For all of the reasons hereinabove urged, we respectfully submit that, both upon reason and authority, the learned Judge of the Court below was in error in holding that the annual income to be derived from an estate for *eleven years* should be taxed, under the War Revenue Act of 1898, as amended and supplemented, upon the basis that such annual income was, in effect, an annual income *for life;* and urge that the judgment of the Court below, in this respect, be reversed, with directions to said Court to enter judgment in favor of plaintiff in error for the full sum of $2,998.80 with interest and costs, as prayed in the amended complaint.

In closing, we may be pardoned for again reminding this Court that in cases of doubt (although we have no doubt of the correctness of our position), the tax should be resolved in favor of the tax-payer, and that the view and practice of the Internal Reve-

nue official, who testified in the case at bar and computed the tax on the basis of *eleven years* and not *for life,* is persuasive and entitled to serious consideration.

It is respectfully submitted that the decision of the lower Court, in awarding the plaintiff in error the sum of $1,432.19 with interest and costs, instead of the sum of $2,998.80 with interest and costs, should be reversed and that this Court, upon the pleadings and record now before it, should direct the Court below to enter judgment in favor of plaintiff in error in the sum of $2,998.80 with interest and costs.

Respectfully submitted,

MARSHALL B. WOODWORTH,
Attorney for Plaintiff in Error.

No. 2846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROSENFELD, as Sole Surviving Trustee of the Trust Created by the Last Will and Testament of John Rosenfeld, Deceased,
Plaintiff in Error,

vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

JOHN W. PRESTON,
United States Attorney,

ANNETTE ABBOTT ADAMS,
Asst. United States Attorney,
Attorneys for Defendant in Error.

Filed this.....day of November, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

SHANNON-CONMY, 509 SANSOME ST.

No. 2846

IN THE

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vs.

JOSEPH J. SCOTT, Collector of Internal Revenue,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR

The proposition involved in this appeal, is not as stated by counsel for plaintiff in error on page 2 of his opening brief, "Whether, under the terms of the last will and testament of John Rosenfeld, deceased, the 'value of the rights to receive the annual income' from certain contingent legacies for the period of eleven years * * * was the equivalent, for the purposes of taxation under the War Revenue Act of June 13, 1898, as amended and supplemented, of the 'value of the rights to receive

the annual income' for life''; but rather, whether, while under the terms of a will providing that the legatees are to enjoy the income from a trust fund for a period of eleven years, at the expiration of which trust period they are not only to continue in the enjoyment of the income thereof, but also come into possession of the corpus of the estate, the interest in the income vesting at the death of the legator is not a life estate in said income rather than an estate therein for the period of eleven years only.

The contentions of the parties to the suit were clearly set forth by the trial court in its opinion (Tr. p. 60), where it was said:

> ''The will of Rosenfeld creating a trust to continue for eleven years, during which period the beneficiaries were to receive the annual income, and at its expiration the principal or corpus of their respective legacies, plaintiffs contend that, under these provisions, the vested right of each subject to the tax was on the income for the definite term of eleven years; defendant, on the other hand, contending that the vested interest of each was to the income for life, since necessarily, under the terms of the will, the beneficiaries would have and enjoy the income not only during the trust, but thereafter during their lives. The latter is, I think, the correct construction.''

From the above language it cannot but appear that the said Court did not, as counsel for plaintiff in error on page 3 of their opening brief, state that he did, hold ''that the 'value of the rights to

receive the annual income' for eleven years should in effect, be treated as the right to receive the annual income for life."

John Rosenfeld's will provided for the creation of a trust fund, the income therefrom to be paid to the beneficiaries thereof by the trustees for a period of eleven years, it being further provided that:

> "At the end of the said period of eleven years or upon the death of the last surviving of my said children, whichsoever shall first occur, then the whole of the trust property remaining on hand shall be distributed in equal shares among my six children, Henrietta Rosener, Sarah Eppstein, Lucy Isabella Weill, Max L. Rosenfeld, Louis Rosenfeld and Henry Rosenfeld; no account shall be taken, or deductions made on account of said monthly payments, or any of them, having been made."

The value of the legacies referred to in the said will were at first assessed by the Collector of Internal Revenue at the clear value of $57,969.55 each, and he thereupon imposed a tax of $652.15 upon each one of the legacies upon the theory that the said legacies had vested in possession and enjoyment prior to the repeal, on July 1, 1902, of the Act of June 13, 1898, as amended by the Act of March 2, 1901. The trial Court and this honorable Court held that the legacies should not have been assessed in gross, the interest in the corpus being a contingent beneficial interest that had not vested prior

to the repeal of the Act. But this Court did hold that

> "The rights of the beneficiaries to receive the income of the legacies were rights which were vested at the time of the assessments which were made thereon, and were subject to the War Revenue Tax, and assessable, not upon the gross amount of the legacies, but upon the value of the rights to receive the annual income as determined in *United States* vs. *Fidelity Trust Co.*"

that is to say, by mortality tables.

On the former trial of the case, and on the appeal thereof, the question as to whether the vested right to the income from the corpus of the legacy was a life estate or an interest for the term of the trust, was not raised; it is before this Court now, for the first time.

On page 16 of his opening brief counsel for plaintiff in error sets forth two so-called cardinal rules of interpretation that, he alleges, should be kept in mind by this Court in determining the propositions herein involved; *first,* that in case of doubt or of ambiguity, statutes imposing taxes are construed most strongly against the Government and in favor of citizens or subjects, and that such statutes are not to be liberally construed; and *second,* that the practice of officials connected with any of the executive departments of the Government in applying certain laws and imposing taxes thereunder is persuasive as to the practical application of the law.

Answering these two propositions advanced by counsel, we desire to say first, that the construction of an act imposing taxes is not really involved here, but rather, the nature of the interest passing under the will of John Rosenfeld, deceased; and second, that counsel apparently did not consider the practice of officials of that executive department of the Government, the Department of Internal Revenue, so persuasive when they originally assessed the legacies in question in gross as vested in possession and enjoyment.

Counsel also argues on page 25 of his opening brief, that the will in the case at bar did not purport to give any of the beneficiaries a life estate or income for life. We contend that the said will not only gave to them an income for life, but more, as it provided that the said beneficiaries should have the income for life, and the corpus itself after the expiration of the trust period.

It will therefore be seen that our contention that the assessment in this case should be made upon the right to receive the annual income for life, rather than for the period of eleven years, is based upon the provisions of the will of John Rosenfeld, by the terms of which the legatees in question were, at the end of the trust period of eleven years, to receive equal distributive shares absolutely. They would, therefore, at the end of the eleven years, not cease to receive the annual income, but would receive *in addition* to that annual income, the principal

itself. We concede that anything more than the annual income which they might receive at the end of the trust period, would not be properly assessable until the expiration of the trust period as it would not "vest in possession or enjoyment" until that time. But we do contend that the right to receive the annual income did not, and could not, under the terms of the will, cease at the end of the trust period, but continued after that time without interruption; that the right to the income having already vested both in possession and enjoyment could not and would not revest in the legatee. Such case as this is distinguishable from one in which, at the end of the trust period, the right to receive the annual income might on the happening of a specified contingency, pass to some one other than the person entitled thereto under the terms of the trust. Here no such contingency appears. The right to receive the annual income is a right which vested in possession and enjoyment at the death of the legator, and which continues throughout the life of the legatee regardless of the trust period; the provisions of the trust did not limit the period of enjoyment of the income, but only postponed the right of the legatee to take possession of, and enter into the enjoyment of the principal or corpus of the legacy.

However difficult it may be for counsel for plaintiff in error to grasp the point which we make here, we cannot admit that our argument is

fatuous since the learned judge of the trial Court has seen fit to give it the honor of his approval.

We respectfully submit that neither in the case of *Vanderbilt* vs. *Eidman,* 196 U. S. 480, 49 L. Ed. 563, nor in *Herold* vs. *Shanley,* 140 Fed. 20, was the point for which we contend decided or even raised. In both those cases the tax was originally assessed on the corpus of the estate of the legatee which was not, by the terms of the will, to be received until the happening of a certain contingency. And the decision in each case was that the corpus of the legacy not having vested in "possession or enjoyment," could not be taxed under the Act of June 13, 1898, though technically the interest may have vested.

Neither decision is in any wise at variance with the position taken by the trial Court in the present case, and here contended for by defendant in error. It cannot be claimed that the income, the enjoyment and possession of which the legatees entered into prior to July 1, 1902, could, under the terms of the will of John Rosenfeld, ever be taken from them during their lives, or that their enjoyment and possession of same would be interrupted except by death, that great contingency which might perhaps interrupt the enjoyment thereof within a period of eleven years, and which no one could foresee. But by the use of mortuary tables the probability of life of each legatee was estimated as

nearly as human minds could compute it and no injustice could result to the legatees thereby.

On page 54 of the Transcript of Record appears the result of the computation of the life interests of the legatees of the estate of John Rosenfeld, deceased, which we respectfully urge shows the tax which should have been assessed and collected, to-wit, $2,480.71. We respectfully urge that the judgment of the trial Court should be affirmed.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

ANNETTE ABBOTT ADAMS,
Asst. United States Attorney,

Attorneys for ~~Plaintiff~~ Defendant in Error.

No. 2850

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation, Claimant of the Steamship "PRINCESS VICTORIA," Her Engines, etc.

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," Her Engines, etc., PACIFIC ALASKA NAVIGATION COMPANY, a Corporation, and ALASKA PACIFIC STEAMSHIP COMPANY, a Corporation, Claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2850

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIREMAN'S FUND INSURANCE COMPANY, a Corporation, Claimant of the Steamship "PRINCESS VICTORIA," Her Engines, etc.

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," Her Engines, etc., PACIFIC ALASKA NAVIGATION COMPANY, a Corporation, and ALASKA PACIFIC STEAMSHIP COMPANY, a Corporation, Claimants,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Names and Addresses of Attorneys of Record.

Names and Addresses of Proctors for Petitioner, Canadian Pacific Railway Company:

W. H. BOGLE, CARROLL B. GRAVES, E. T. MERRITT, LAURENCE BOGLE, 610 Central Building, Seattle, Washington.

Names and Addresses of Proctors for Claimants, Pacific Alaska Navigation Company and Alaska Pacific Steamship Company:

B. S. GROSSCUP, W. C. MORROW, Bank of California Bldg., Tacoma, Wash.

RICHARD SAXE JONES, CHARLES F. RIDDELL, Colman Bldg., Seattle, Wash.

Names and Addresses of Proctors for Claimant, Fireman's Fund Insurance Company:

EDWARD J. McCUTCHEON, WARREN OLNEY, Jr., CHARLES W. WILLARD, IRA A. CAMPBELL, Merchants Exchange Bldg., San Francisco, California. [1*]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

R. A. BALLINGER, ALFRED BATTLE, R. A. HULBERT, BRUCE C. SHORTS, Alaska Building, Seattle, Washington. [2]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Statement.

Proceeding was commenced by filing of Petition of Canadian Pacific Railway Company for Limitation of Liability on August 29, 1914.

NAMES OF PARTIES.

Canadian Pacific Railway Company, a corporation, petitioner.

Pacific Alaska Navigation Company and Alaska Pacific Steamship Company, claimants.

Fireman's Fund Insurance Company, Claimant and Appellant herein.

Dates when pleadings were filed.

Petition for limitation of liability, August 29, 1914.

Monition, September 9, 1914.

Citation was issued, duly published and filed on December 15, 1914.

Answer and claim of Fireman's Fund Insurance

Company (pursuant to extention of time duly authorized), January 27, 1915.

Interlocutory decree of limitation of liability, November 5, 1915.

Stipulations relating to claim of Fireman's Fund Insurance Company, dated August 26, 1915, and June 12, 1916, filed August 24, 1916.

Order and decree allowing claim of Fireman's Fund Insurance Company, signed and filed, August 24, 1916.

REFERENCE TO COMMISSIONER.

Matter was referred to Commissioner A. C. Bowman by order **[3]** dated Sept. 3, 1914, for purpose of receiving claims. No testimony on claims was taken before Commissioner.

On Dec. 15, 1914; Dec. 28, 1914; Jan. 14, 1915; Jan. 23, 1915; Feb. 17, 1915. Commissioner filed report of all claims received by him, together with the claims.

TIME OF TRIAL.

The principal amount of the claim of Fireman's Fund Insurance Company having been agreed upon by stipulation dated June 12, 1916, the matter was on said date, pursuant to said stipulation, brought on for hearing upon the question of the right of said claimant to interest upon said amount.

The Court orally announced its decision allowing the principal amount of said claim but disallowing and refusing interest thereon prior to said date of hearing, and on August 24, 1916, formal decree in accordance with such decision was signed and filed.

Fireman's Fund Insurance Company on August 24, 1916, served and filed its Notice of Appeal, Assignment of Errors, Cost Bond on Appeal and Notice of Filing same.

On August 24, 1916, a stipulation relating to contents of Apostles on Appeal was signed and filed. [4]

United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Petition for Limitation of Liability.

The libel and petition of the Canadian Pacific Railway Company, owner of the steamship "Princess Victoria," her engines, boilers, tackle, apparel and furniture, in a cause of limitation of liability civil and maritime, alleges as follows:

I.

That the petitioner and libelant is and was at the time hereinafter mentioned the sole owner of the Canadian Steamship "Princess Victoria," of 1943 gross and 785 net tons, which said steamer is now lying in the port of Seattle and within the jurisdiction of this Honorable Court.

II.

That on the 25th day of August, 1914, about the

hour of eleven P. M., said steamship "Princess Victoria" left the port of Vancouver in the Province of British Columbia, Dominion of Canada, with passengers and cargo bound for the port of Seattle in the State of Washington; that at the time of leaving the port of Vancouver, and at all other times herein mentioned, said steamship "Princess Victoria" was properly manned and equipped and had a full complement of officers and seamen aboard, and was in all respects [5] staunch, tight and setworthy.

III.

That while on said voyage from the port of Vancouver, and about 4 o'clock in the morning of August 26, 1914, the said steamship encountered considerable fog and smoke, she being then in the vicinity of Smith Island; that upon encountering said fog and smoke the master of said vessel was immediately called and came on watch, and was thereafter in full control of the navigation and management of said steamship; that upon encountering said fog and at all times hereinafter mentioned, a competent and careful lookout was kept and maintained, and a competent quartermaster was kept at the wheel of said steamship attending to his duties; that upon encountering said fog said steamship proceeded with caution, sounding her fog-whistle at regular intervals as required by law. That said steamship proceeded on her voyage until she had reached the vicinity of Double Bluff, being a point on the southwesterly portion of Whidbey Island, at which time her course was changed so as to carry her safely by

Point No Point; that at the time of changing her course at Double Bluff the fog-horn at Point No Point was plainly heard and shortly thereafter the fog-whistle of a vessel was heard off to the starboard of the "Princess Victoria"; that upon hearing said whistle, and determining that the same was proceeding from an approaching vessel, the fog-whistles of the "Princess Victoria" were quickened and her engines were stopped and put astern in order to check the headway of the said steamship and to bring her to a standstill in the water; that shortly thereafter the said approaching steamer, which proved to be the steamer "Admiral Sampson," suddenly emerged from the fog, going at a high rate of speed on a course directly across the bow of the "Princess Victoria" and in a very close proximity to said steamship "Princess Victoria"; and almost immediately thereafter the two steamers came into collision, the port side of the steamer "Admiral Sampson" [6] at a point about opposite her after hatch, coming in to collision with the bow of the "Princess Victoria," inflicting considerable damage to both vessels, as a result of which the steamer "Admiral Sampson" sank shortly afterwards, some of her crew and passengers being drowned and others injured, and her entire cargo either lost or damaged. That said "Princess Victoria" was also severely damaged by reason of said collision, a large hole about twenty feet in length and several feet in width being stove in her bow, and a number of plates cracked and damaged, the exact extent of which damage is not known at

this time, but according to the petitioner and libelant's information and belief, said petitioner and libelant and said "Princess Victoria have been damaged by reason of said collision in the sum of approximately twenty thousand dollars ($20,000); that notwithstanding such damages, the "Princess Victoria" after using every effort to save the passengers and crew of the "Admiral Sampson," and after having saved a large portion thereof, succeeded in making the port of Seattle under her own steam, where she is now lying.

IV.

On information and belief, petitioner avers that the value of said steamship "Princess Victoria" after the said collision and at the close of said voyage, did not exceed the sum of two hundred and fifty thousand dollars ($250, 000), and that the pending freight and passenger money for said voyage did not exceed the sum of eight hundred dollars ($800.00).

V.

That the said collision, and damage consequent thereto, was in no wise caused by the fault of the said steamship "Princess Victoria," her master, officers or crew, but solely by reason of the [7] negligence of those on board of and in charge of the said steamer "Admiral Sampson," in that she was proceeding at an excessive rate of speed in the condition of fog existing at and in the vicinity of the point of collision, and in that she was not sounding her fog-signals in the manner as required by law, and in that she changed her course and attempted to cross the bow of the steamer "Princess Victoria"

when said vessels were in close proximity, and in that she was not properly navigated in other respects, as will be shown on the trial of this cause.

VI.

That said collision happened and the loss, damages and injury above referred to were done, occasioned and incurred without fault on the part of the petitioner and without its privity or knowledge. Nevertheless, a certain libel has been filed against said steamship "Princess Victoria" by reason of the said collision and accident, by the Alaska Pacific Steamship Company, a corporation, and Pacific Alaska Navigation Company, a corporation, as owner and charterer respectively of the steamer "Admiral Sampson"; that said libel is numbered 2825 on the records and files of this court, and the libelants therein claim to recover damages sustained by them as follows:

For loss of said steamship "Admiral Sampson"..	$500,000
For loss of cargo, freight, baggage and effects.....	150,000
For loss of the baggage and effects of the master and mariners aboard the said "Admiral lision.....	15,000
For expenses arising out of said collision	15,000
The total claim of libelants being the sum of	$670,000

That the said steamship "Princess Victoria" has been seized under process in said action and is now in the custody of the United States Marshal; that the proctors for libelants in said action are W. C. Morrow and Jones & Riddell, Colman Building, Seattle. [8]

That in addition to the said libel, which is the only claim of which petitioner now has knowledge, it is feared that other suits or actions may be brought against it or against the steamship "Princess Victoria" by other parties who may have or claim to have sustained loss, damage or injury by reason of said collision, and petitioner avers that the amount of the claim in the suit which has already been begun against said steamship "Princess Victoria" far exceeds the value of its interest in said steamship and her freight and passage money pending.

VII.

Petitioner desires to claim the benefits of the provisions of sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto, in this proceeding, by reason of the facts and circumstances hereinabove set forth, petitioner further desires to contest its liability and the liability of the said steamship "Princess Victoria" to any extent whatever, for any and all loss, destruction, damage and injury of whatsoever kind caused by and resulting from the collision aforesaid, and to that end desires an appraisement of the value of said seamship "Princess Victoria" in the condition in which she was at the time of her arrival in the port of Seattle

after the said collision, at the completion of said voyage, and for that purpose your petitioner asks that such appraisement be made by three commissioners or appraisers to be appointed by this Court, or by such other means as this Court may direct, and your petitioner is willing and ready to give a stipulation, with sureties approved by this Court, for the payment of the amount of such appraisement whenever such payment shall be ordered by this Court, in case it is found that this petitioner or the said steamship "Princess Victoria" is liable for any damage resulting from said collision. [9]

VII.

All and singular the premises are true within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, petitioner prays that this Court will cause due appraisement to be had of the said steamship "Princess Victoria" at the close of said voyage after the said collision and her freight and passenger moneys then pending, and will make an order for the payment of the same into court or for the giving of a stipulation, with sureties, providing for the payment thereof, as ordered by the Court; that the Court will issue a monition to all persons claiming damages for any and all loss, destruction, damage or injury caused by or resulting from the collision aforesaid, citing them to appear before the United States Commissioner to be named by this Court, and to make due proof of their respective claims at or before a certain time to be fixed by said writ, and also to appear and answer on oath the alle-

gations of this petition according to law and the practice of this Court, and that the Court will issue its injunction restraining the prosecution of the aforesaid libel by the Alaska Pacific Steamship Company, a corporation, and Pacific Alaska Navigation Company, a corporation, and the commencement and prosecution hereafter of all and any suit or suits, action or actions, or legal proceedings of any nature or description whatsoever except in this proceeding, against the petitioner herein or the steamship "Princess Victoria" in respect of any claim or claims of any kind or nature arising out of said collision, and that this Court in this proceeding will adjudge that the petitioner and said steamship "Princess Victoria" are not, and that neither of them is, liable to any extent for any such loss, damage or injury, or if it shall adjudge that they are or either of them is liable, then that the liability of the petitioner be limited to the amount of the value [10] of its interest in said steamship and her freight and passenger moneys pending at the close of said voyage after said collision, and that the moneys paid or secured to be paid as aforesaid be divided *pro rata* among such claimants as may duly prove their claims before the United States Commissioner heretofore referred to, saving to all parties any priority to which they may be legally entitled, and that petitioner may have such other and further relief as it may be entitled to under

the rules and practice of this court in maritime matters.

CANADIAN PACIFIC RAILWAY COMPANY.

By E. E. PENN,
General Agent P. D., Petitioner.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Petitioner. [11]

United States of America,
Western District of Washington,—ss.

E. E. Penn, being first duly sworn, on oath deposes and says: That he is the General Agent Passenger Dep't of Canadian Pacific Railway Company, the petitioner above named, and makes this verification in its behalf as such officer; that he has read the foregoing petition, knows the contents thereof, and that the statements therein contained are true, as he verily believes.

E. E. PENN.

Subscribed and sworn to before me this 29th day of August, 1914.

[Seal] F. T. MERRITT,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Filed Aug. 29, 1914.) [12]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation, of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for the Limitation of Liability.

Monition.

The President of the United States of America, to the Marshal of the United States for the Western District of Washington, Northern Division, Greeting:

WHEREAS, a libel and petition were filed in the District Court of the United States for the Western District of Washington, Northern Division, by the Canadian Pacific Railway Company, owner of the steamship "Princess Victoria," for a limitation of its liability concerning the loss, damage or injury arising out of or occasioned by that certain voyage of the steamship "Princess Victoria" commencing at Vancouver, B. C., Dominion of Canada, on August 25th, 1914, at eleven o'clock P. M., and ending at Seattle, Washington, on August 26th, 1914, at about ten o'clock A. M., whether the same arose out of or by reason of the collision between the said steamship "Princess Victoria" and the steamship "Admiral Sampson" on the morning of August 26, 1914, while said steamship "Princess [13] Vic-

toria'' was on the aforesaid voyage, or otherwise, for the reasons and causes in said libel and petition mentioned, and praying that a monition of the said Court in that behalf be issued and that all persons claiming damages for any such loss, damage or injury may be thereby cited to appear before the said Court and make due proof of their respective claims, and all proceedings being had, that if it shall appear that the said petitioner is not liable for any such loss, damage or injury, it may be so finally decreed by this Court; and

WHEREAS, the Court has caused said steamship and her freight pending at the termination of said voyage to be appraised, and said appraisers have returned their appraisement to said Court appraising said steamship and her freight pending at Two Hundred Eighty-six Thousand, Two Hundred Twenty-five and 10/100 Dollars ($286,225.10), and a stipulation for said appraised amount, duly approved, has been filed in this court, and the Court has ordered that a monition issue against all persons claiming damage for any loss, damage or injury arising on said voyage of said steamship where occasioned or caused by the said collision, or otherwise, to appear and make due proof of their respective claims.

You are, therefore, commanded to cite all persons claiming damages for any damage, loss or injury arising out of or upon that certain voyage of the steamship ''Princess Victoria'' commencing at Vancouver, B. C., Dominion of Canada, on August 25, 1914, at eleven o'clock P. M., and ending at Seattle, Washington, on August 26, 1914, at about ten o'clock

A. M., whether occasioned by the collision between the steamship "Princess Victoria" and the steamship "Admiral Sampson" which occurred on the morning of August 26, 1914, while said steamship "Princess Victoria" was on the aforesaid voyage, or otherwise, to **[14]** appear before said Court and make due proof of their respective claims before A. C. Bowman, a United States Commissioner, at his office in the Central Building, room number 536, City of Seattle, on or before the 15th day of December, 1914, at ten o'clock in the forenoon, and you are also commanded to cite such claimants to appear and answer the allegations of the libel and petition herein on or before said last-named date, or within such further time as this Court may grant, and to have and recover such relief as may be due, and what you have done in the premises, do you then make return to this Court, together with this writ.

WITNESS the Honorable JEREMIAH NETERER, Judge of said court, at the City of Seattle, in the Northern Division of the Western District of Washington, this 3d day of September, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the United States one hundred and thirty-eight.

[Seal] FRANK L. CROSBY,
Clerk.
By Ed. M. Lakin,
Deputy Clerk, U. S. Dist. Court, Western Dist. of Washington. **[15]**

Return on Service of Writ of Monition.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed Monition on W. C. Morrow, Jones & Riddell, Proctors for libelant in the case of Alaska Pacific S. S. Co. vs. S. S. "Princess Victoria" etc., by handing to and leaving a true and correct copy thereof with Richard Saxe Jones, representing the said W. C. Morrow, Jones & Riddell personally at Seattle, Wash., in said District on the 4th day of September, A. D. 1914.

(Signed) JOHN M. BOYLE,
U. S. Marshal.
By H. V. R. Anderson,
Deputy.

Marshal's fees $2.12.

[Indorsed]: Monition. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Sep. 9, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. **[16]**

United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Answer of Fireman's Fund Insurance Company.

The answer of Fireman's Fund Insurance Company, a corporation, claimant herein, to the libel and petition of the Canadian Pacific Railway Company, a corporation, owner of the S. S. "Princess Victoria," in a cause of limitation of liability, civil and maritime, admits, denies and alleges, as follows:

I.

Claimant admits the allegations of paragraph I of said petition.

II.

Claimant admits that portion of paragraph II of said petition alleging that on the 25th day of August, 1914, about the hour of 11 o'clock P. M., said S. S. "Princess Victoria" left the port of Vancouver, in the Province of British Columbia, Dominion of Canada, with passengers and cargo, bound for the port of Seattle, State [17] of Washington.

Claimant is ignorant as to the truth or falsity of the remaining allegations of said paragraph, and for that reason demands that strict proof of the same be made.

III.

Answering unto the allegations of paragraph III of said petition, claimant admits that while on said voyage from the Port of Vancouver, at about —— o'clock on the morning of August 26th, 1914, said S. S. "Princess Victoria" encountered considerable fog and smoke; admits that at least after passing Double Bluff, and prior to reaching Point No Point, the fog-whistle of a vessel was heard to the star-

board of the "Princess Victoria"; admits that the two steamers came into collision, the port side of the "Admiral Sampson," at a point about opposite her after hatch, coming into collision with the bow of the "Princess Victoria," inflicting considerable damage to both vessels, as a result of which the steamer "Admiral Sampson" sank shortly afterward, some of her crew and passengers being drowned, and her entire cargo lost; admits that said "Princess Victoria" was also severely damaged by reason of said collision, a large hole about twenty feet in length and several feet in width being stove in her bow; admits that notwithstanding such damage the "Princess Victoria," after using every effort to save the passengers and crew of the "Admiral Sampson," and after having saved a large portion thereof, succeeded in making the Port of Seattle under her own steam, where she was lying at the time of filing of said petition. [18]

Claimant denies that portion of said paragraph alleging that upon encountering said fog, and at all times in said petition mentioned, a competent and careful lookout was kept and maintained; denies that upon encountering said fog said steamship "Princess Victoria" proceeded with caution; denies that upon hearing the whistle of said steamship "Admiral Sampson," and determining that the same was proceeding from an approaching vessel, the fog-whistles of the "Princess Victoria" were quickened, and her engines were stopped and put astern in order to check the headway of said steamship, and to bring her to a standstill in the water; denies that shortly

thereafter the said approaching steamer, which proved to be the steamship "Admiral Sampson," suddenly emerged from the fog, going at a high rate of speed on a course directly across the bow of the "Princess Victoria."

Claimant is ignorant as to the truth or falsity of the remaining allegations of said paragraph, and for that reason demands that strict proof of the same be made.

IV.

Claimant denies the allegations of paragraph IV of said petition, and in that behalf alleges that the combined value of said S. S. "Princess Victoria," and her pending freight and passenger money for said voyage after said collision and at the close of said voyage was the sum of Two Hundred and Eighty-six Thousand Two Hundred and Twenty-five (286,225) Dollars.

V.

Claimant denies each and every of the allegations of paragraph V of said petition. **[19]**

VI.

Answering unto the allegations of paragraph VI of said petition, claimant denies that said collision happened, and the loss, damage and injury above referred to were done, occasioned and incurred without fault on the part of the petitioner, and without its privity or knowledge.

VII.

Answering unto the allegations of paragraph VIII of said petition, claimant denies that all and singular the premises are true.

Further answering unto the allegations of said petition, claimant avers:

I.

That it is and was during all the times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California, and was and is engaged in the business, *inter alia*, of marine insurance.

II.

That it has duly made and filed its claim for the losses sustained by it by reason of the collision referred to herein with the Honorable A. C. Bowman, the commissioner duly appointed by this Court.

III.

That it is informed and believes, and so alleges the fact to be that the aforementioned collision between said steamships "Princess Victoria" and "Admiral Sampson" **[20]** off Point No Point, State of Washington, was caused by the unlawful and negligent navigation of the said steamship "Princess Victoria" in that at the time of said collision she was, and for a long time prior thereto had been, enveloped in a dense fog, and during all of said times was running at a high and unlawful speed, and was not maintaining the proper watch and lookout required by law, and did not, as required by the laws and rules of navigation governing said vessel, stop her engines on first hearing the fog signals of the "Admiral Sampson," and then navigate with caution until the danger of collision was over.

IV.

That it is informed and believes, and so alleges

the fact to be that said collision, and the loss of said steamship "Admiral Sampson," and all of her cargo, including that hereinafter referred to, was done, occasioned and incurred with the privilege and knowledge of said petitioner and J. W. Troup, the managing officer thereof, in that said collision was caused and contributed to by said "Princess Victoria" running at an unlawful and excessive rate of speed in said fog, which violation of the law and rules of navigation governing said vessel was in accordance with the usual and customary navigation of said steamship while running in fog, and all of which was well known to, permitted and authorized by petitioner and J. W. Troupe, the managing officer thereof.

V.

That it was the insurer against loss by perils of the seas, including collision, of a large quantity of **[21]** merchandise laden on board, and totally lost by the sinking, of said steamship "Admiral Sampson"; that by reason of said loss of said cargo it was compelled to pay, and has paid, the owners thereof, the full value of the same, and has, by reason of such payment, become subrogated to all of the rights of said cargo owners against petitioner for the value of said cargo.

That the following is a list of said cargo owners, and a statement of the value of said cargo;

Name of Owners.	Value of Cargo Lost.
Alaska Gastineau Mining Company.....	26,147.00
Turner & Pease Co., Inc.....	370.00
Seward Commercial Company.....	59.00

Washington Mattress Company	55.00
H. S. Emerson Company, Inc	217.00
Lindberg Grocery Company	75.00
C. N. Young Company	751.00
Mrs. Jessie Ellsworth	86.00
Northwest Grocery Company	39.00
Valdez Brewing & Bottling Company	296.00
Charles Goldstein	239.00
S. Blum & Company	601.00
H. J. Raymond Company	23.00
Krielsheimer Brothers	1,416.00
Augustine & Kyer	278.00
Stewart & Holmes Drug Company	32.00
Schwabacher Hardware Company	341.00
Julius Jensen	163.00
Scandinavian Grocery Company	92.00
J. H. Finley & Company	127.00

[22]

VI.

That the total loss of said cargo shipped and totally lost on board said S. S. "Admiral Sampson" by said unlawful and negligent navigation of said steamship "Princess Victoria," was the sum of thirty-one thousand, four hundred and seven (31,407) dollars; that by reason of said loss, and of claimant's insurance against the same, and the payment to the owners of said cargo of a full indemnity therefor, claimant is entitled to have and recover judgment against petitioner herein said sum of Thirty-one Thousand, Four Hundred and Seven (31,407) Dol-

lars, together with legal interest thereon from the date of said collision.

VII.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, claimant prays that this Honorable Court will deny the prayer of said petitioner for a limitation of liability, and will condemn said petitioner to pay unto claimant the losses and damages hereinabove set forth, with interest and costs, and will otherwise right and justice administer in the premises.

McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant. **[23]**

State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath, deposes and says:

That he is the agent of Fireman's Fund Insurance Company, a corporation, claimant in the above-entitled action, and makes this verification for and on behalf of said corporation; that he has read the foregoing answer, knows the contents thereof, and that he believes the same to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 26 day of January, 1915.

[Seal] R. G. DENNY,

Notary Public in and for the County of King, State of Washington.

(Filed Jan. 27, 1915.) **[24]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Stipulation Re Collision Between "Princess Victoria" and "Admiral Sampson," etc.

IT IS HEREBY STIPULATED AND AGREED by, between and among:

FIRST PARTY:

Canadian Pacific Railway Company, a corporation, petitioner above named, owner of the steamship "Princess Victoria."

SECOND PARTY:

Pacific Alaska Navigation Company, a corporation, one of the claimants herein and charterer of the steamship "Admiral Sampson."

THIRD PARTY:

Alaska Pacific Steamship Company, a corpora-

tion, one of the claimants herein, and owner of the steamship "Admiral Sampson."

FOURTH PARTY:

St. Paul Fire & Marine Ins. Co., General Marine Ins. Co. of Dresden, Ltd., Aetna Ins. Co. of Hartford, Sea Ins. Co., Ltd., Western Assurance Co., World Marine & General Ins. Co., Ltd., Standard Marine Ins. Co., Ltd., Phoenix Assurance Co., Ltd., of London, Canton Ins. Office Ltd., North China Ins. Co., Ltd., Union Marine Ins. Co., Ltd., British and Foreign Marine Ins. Co., Ltd., Fireman's Fund Ins. Co., Yang-Tsze Ins. Assn., Ltd., Manheim Ins. Co. of Manheim, Germany, La Fonciere Compagnie D'Assurances, Federal Ins. Co., The Marine Ins. Co., Ltd., and Atlantic Mutual Insurance Co., claimants herein, commonly known as cargo claimants.

By their respective proctors of record, as follows:

I.

That in determining the rights of fourth party herein, it may be and is admitted by the parties hereto that the collision between the steamship "Princess Victoria" and the "Admiral Sampson" on August 26, 1914, as set forth in the petition herein, and all the loss and damage approximately resulting therefrom, was caused by the mutual fault and negligence of both of said vessels. [25]

II.

Second party, third party and fourth party hereto hereby consent and agree that in so far as the rights of fourth party, the said cargo claimants, are concerned, a decree may be entered in this cause limit-

ing the liability of the petitioner, the said first party.

III.

First party, second party, and third party hereby agree that no portion of the claims of the second party and / or third party shall be paid by first party until the claims of fourth party, the said cargo claimants, have been paid in full.

IV.

First party, second party and third party do not hereby admit the correctness of the amounts of the respective claims of fourth party, the said cargo claimants, as filed herein, and it is agreed that the amounts of such claims, in the event the same cannot be agreed upon by the parties hereto, shall be established by the said cargo claimants in the proceeding by competent proof.

DATED, at Seattle, Washington, this 26th day of August, 1915.

BOGLE, GRAVES,MERRITT & BOGLE,
Proctors for First Party.
GROSSCUP & MORROW,
JONES & RIDDELL and
IRA A. CAMPBELL,
Proctors for Second Party.
GROSSCUP & MORROW,
JONES & RIDDELL and
IRA A. CAMPBELL,
Proctors for Third Party.
McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Fourth Party.

(Filed Aug. 24, 1916.) **[26]**

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Interlocutory Decree.

A libel and petition having been filed herein on the 29th Day of August, 1914, by the Canadian Pacific Railway Company, a corporation of the Dominion of Canada, as owner of the Steamship "Princess Victoria," under the provisions of Sections 4283 to 4285 of the Revised Statutes of the United States and the several Acts and Statutes amendatory thereof and supplemental thereto, for the limitation of its liability for any and all loss, destruction, damage or injury of whatsoever kind occasioned by or resulting from, or in connection with, the collision of the said steamship "Princess Victoria" with the steamship "Admiral Sampson," which occurred on the 26th day of August, 1914; and

The said Canadian Pacific Railway Company having also contested any and all liability resulting from or in connection with said collision, independently of the limitation of liability so claimed as aforesaid, and having, pursuant to the order of this court, filed a stipulation for the value of the said steamship "Princess Victoria" in the sum of Two

Hundred [27] Eighty-six Thousand, Two Hundred Twenty-five and 10/100 Dollars ($286,225.10) for the benefit of all persons awarded damages by reason of said collision; and

This Court having heretofore, to wit, on the 3d day of September, 1914, issued a monition against all persons claiming damages for any loss, destruction, damage or injury occasioned by or on account of said collision, and requiring all such persons to appear before this Court and make due proof of their respective claims, before the Honorable A. C. Bowman, Commissioner of this court, at his office in the Central Building, in the City of Seattle, Washington, on or before the 15th day of December, 1914; and

Public Notice of said monition having been duly given as required by law and the practice of this court, and the said commissioner having duly made and filed his report, wherein and whereby it appears that certain claims therein enumerated, and no others, have been presented pursuant to said monition, and the matter having come on to be heard by the court, upon the libel and petition of said Canadian Pacific Railway Company, and the answers thereto of certain claimants who filed answers therein contesting the prayer of said petitioner for a limitation of its liability, and testimony having been offered in support of the said petition, and due deliberation having been had; now, on motion of Messrs. Bogle, Graves, Merritt & Bogle, proctors for the Canadian Pacific Railway Company;

It is ORDERED, ADJUDGED and DECREED that the said petitioner, Canadian Pacific Railway

Company, is entitled to a limitation of its liability, as provided by the Act of Congress, approved March 3, 1851, and embodied in Sections 4283 to 4285 of the Revised Statutes of the United States and the various Acts and Statutes amendatory thereof and supplemental thereto; **[28]**

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the liability of the said petitioner for any loss, damage, injury or destruction occasioned by or resulting from the aforesaid collision, be, and the same is, hereby limited to the sum of Two Hundred Eighty-six Thousand, Two Hundred and Twenty-five and 10/100 ($286,225.10), being the amount of the stipulation for the value of the said steamship "Princess Victoria," filed herein by the said petitioner.

Done in open court this 5th day of November, A. D. 1915.

JEREMIAH NETERER,
Judge.

[Endorsements]: Interlocutory Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 5, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[29]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Stipulation Re Amounts of Cargo Claimants, etc.

IT IS HEREBY STIPULATED AND AGREED by, between and among:

FIRST PARTY:

Canadian Pacific Railway Company, a corporation, petitioner above named, owner of the Steamship "Princess Victoria,"

SECOND PARTY:

Pacific Alaska Navigation Company, a corporation, one of the claimants herein and charterer of the Steamship "Admiral Sampson."

THIRD PARTY:

Alaska Pacific Steamship Company, a corporation, one of the claimants herein, and owner of the Steamship "Admiral Sampson."

FOURTH PARTY:

St. Paul Fire & Marine Ins. Co., General Marine Ins. Co. of Dresden, Ltd., Aetna Ins. Co. of Hartford, Sea Ins. Co., Ltd., Western Assurance Co., World Marine & General Ins. Co., Ltd., Standard

Marine Ins. Co., Ltd., Phoenix Assurance Co., Ltd., of London, Canton Ins. Office, Ltd., North China Ins. Co., Ltd., Union Marine Ins. Co., Ltd., British and Foreign Marine Ins. Co., Ltd., Fireman's Fund Ins. Co., Yang-Tsze Ins. Assn., Ltd., Manheim Ins. Co. of Manheim, Germany, La Fonciere Compagnie D'Assurances, Federal Ins. Co., The Marine Ins. Co., Ltd., and Atlantic Mutual Insurance Co., claimants herein, commonly known as cargo claimants,

By their respective proctors of record, as follows:

I.

That in pursuance of a written stipulation between the parties hereto dated August 26, 1915, the amounts of the respective claims of fourth parties, the said cargo claimants, as filed herein **[30]** have been investigated, and it is agreed that the principal amounts of such claims are as follows:

St. Paul Fire & Marine Ins. Co.	$3,660.92
General Marine Ins. Co. of Dresden, Ltd.	50.00
Aetna Ins. Co. of Hartford	4,033.20
Sea Ins. Co. Ltd	833.08
Western Assurance Co	518.00
World Marine & General Ins. Co. Ltd	649.00
Standard Marine Ins. Co. Ltd	630.00
Phoenix Assurance Co. Ltd. of London	360.00
Canton Ins. Office Ltd	1,998.69
North China Ins. Co. Ltd	248.00
Union Marine Ins. Co. Ltd	25.00
British and Foreign Marine Ins. Co. Ltd	1,573.20
Fireman's Fund Ins. Co	31,392.04
Yang-Tsze Ins. Assn. Ltd	1,112.00

Manheim Ins. Co. of Manheim, Germany..	406.25
La Fonciere Compagnie D'Assurances....	25.00
Federal Ins. Co.....	285.70
The Marine Ins. Co. Ltd.....	1,214.80
Atlantic Mutual Ins. Co.....	960.00

II.

Fourth parties contend that they are entitled to recover in addition to the principal amount of their respective claims as aforesaid, interest thereon at the rate of six per cent (6%) from the several dates of payment of the items constituting such respective claims, and fourth parties further contend that they are also entitled to recover ther taxable costs. First, second and third parties deny the right of fourth parties to recover interest and costs as contended for by fourth parties.

III.

The Court may enter a decree allowing fourth parties the principal amounts of their respective claims as aforesaid, giving same preference over other claims, as provided for in paragraph III of said stipulation dated August 26, 1915, and the question of the rights of fourth parties to recover interest and costs as aforesaid shall be submitted to the Court for determination, each party hereto reserving the right to appeal from the decision of the Court upon the question so submitted, it being further agreed that if interest and costs as aforesaid **[31]** are allowed, the same shall have the preference over other claims as provided for in paragraph III of the said stipulation, dated August 26, 1915.

Dated, at Seattle, Washington, this 12th day of June, A. D. 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for First Party.

IRA A. CAMPBELL,
GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Second Party,

IRA A. CAMPBELL,
GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Third Party.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Fourth Party.

(Filed Aug. 24, 1916.) **[32]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2829.

In the Matter of The Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA" for Limitation of Liability.

Order and Decree.

This matter coming before the Court on the 12th day of June, 1916, upon the stipulation of the parties, dated June 12, 1916 and the Court having heard the

argument of counsel for the respective parties and being fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED and DECREED that the claims of the respective cargo claimants be fixed and allowed as follows:

St. Paul Fire & Marine Ins. Co.	$ 3,660.92
General Marine Ins. Co. of Dresden, Ltd.	50.00
Aetna Ins. Co. of Hartford	4,033.20
Sea Ins. Co. Ltd.	833.08
Western Assurance Co.	518.00
World Marine & General Ins. Co. Ltd.	649.00
Standard Marine Ins. Co. Ltd.	630.00
Phoenix Assurance Co. Ltd. of London	360.00
Canton Ins. Office Ltd.	1,998.69
North China Ins. Co. Ltd.	248.00
Union Marine Ins. Co. Ltd.	25.00
British and Foreign Marine Ins. Co. Ltd.	1,573.20
Firemen's Fund Ins. Co.	31,392.04
Yang-Tsze Ins. Assn. Ltd.	1,112.00
Manheim Ins. Co. of Manheim, Germany	406.25
La Fonciere Compagnie D'Assurances	25.00
Federal Ins. Co.	285.70
The Marine Ins. Co. Ltd.	1,214.80
Atlantic Mutual Ins. Co.	960.00

[33]

IT IS FURTHER ORDERED and DECREED that the above-named claimants have judgment against the Canadian Pacific Railway Company, Petitioner above-named and the American Surety Company, a corporation, surety on petitioner's release bond, for the full amount of their respective

claims, as above allowed, with costs and interest from June 12, 1916, but without interest prior to said date.

Done in open court this 24th day of August, 1916.

EDWARD E. CUSHMAN,
Judge.

Each of the above-named cargo claimants, except the St. Paul Fire and Marine Insurance Company and the Atlantic Mutual Insurance Company, by their proctors of record, hereby except to the provisions of the foregoing decree, disallowing interest upon their respective claims prior to June 12, 1916.

Exception allowed.

Dated this 24th day of August, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed Aug. 24, 1916.) **[34]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Notice of Appeal.

To Messrs. Bogle, Graves, Merritt & Bogle, Proctors for Petitioner, Canadian Pacific Railway Company

To Messrs. Grosscup & Morrow, and Jones & Riddell, Proctors for Pacific Alaska Navigation Company and Alaska Pacific Steamship Company, Claimants herein, and

To Frank L. Crosby, Clerk of the Above-entitled Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, That Fireman's Fund Insurance Company, a corporation, one of the claimants in the above-entitled proceeding, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the final order and decree made and entered herein on the 24th day of August, 1916, refusing and disallowing interest upon the principal amount of said claimant's claim, to wit, $31,392.04, prior to June 12, 1916.

Dated at Seattle, Washington, August 24th, 1916.

McCUTCHEN, OLNEY, WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Claimant and Appellant, Fireman's Fund Insurance Company.

[Endorsed]: Copy of within Notice of Appeal received and due service thereof acknowledged this 24th day of August, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Canadian Pacific Railway.

GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Pacific Navigation Co. and Alaska Pacific Steamship Co.

(Filed Aug. 24, 1916.) [35]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of THE CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Fireman's Fund Insurance Company, a corporation organized and existing under the laws of the State of California, as Principal, and Hartford Accident & Indemnity Company, a corporation organized under the laws of the State of Connecticut and authorized to transact business as surety within the Western District of the State of Washington, as surety, are held and firmly bound unto Canadian Pacific Railway Company, petitioner herein, Pacific Alaska Navigation Company, a corporation, and

Alaska Pacific Steamship Company, a corporation, claimants herein, in the sum of Two Hundred and Fifty Dollars ($250), to be paid unto said petitioner and claimants, for the payment of which well and truly to be made we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Signed and dated at Seattle, Washington, this 24th day of August, 1916.

The conditions of this obligation are such, that whereas, Fireman's Fund Insurance Company as appellant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a portion of an order and decree of the above-entitled court signed and entered herein on the 24th day of August, 1916; [36]

NOW, THEREFORE, If the above named Fireman's Fund Insurance Company, Appellant, shall prosecute its said appeal to effect and pay the costs if the appeal is not sustained, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

FIREMAN'S FUND INSURANCE COMPANY.
By FRANK G. TAYLOR,
Its General Agent.

HARTFORD ACCIDENT & INDEMNITY COMPANY.
By B. C. SHORTS,
Its Attorney in Fact.

[Seal] Attest: R. C. ATKINSON,
Its Attorney in Fact.

Approved.
EDWARD E. CUSHMAN,
District Judge.

Notice of Filing Cost Bond on Appeal.

To Messrs. Bogle, Graves, Merritt & Bogle, Proctors for Canadian Pacific Railway Company, a corporation, Petitioner herein;

Messrs. Grosscup & Morrow, and Jones and Riddell, Proctors for Alaska Pacific Steamship Company and Pacific Alaska Navigation Company, Claimants herein:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, That Fireman's Fund Insurance Company, claimant herein, as appellant, has this day filed in the office of the clerk of the District Court of the United States for the Western District of Washington, Northern Division, its Cost Bond on Appeal, which said bond is executed by it as principal and by Hartford Accident & Indemnity Company, a corporation, as surety, and that the address, residence, and [37] principal place of business of R. C. Atkinson, who attested as attorney in fact for said surety the said bond, is office No. 607, Hoge Building, Seattle, Washington, and that the address, residence and principal place of business of B. C. Shorts, who executed said bond as attorney in fact for said surety, is office No. 901 Alaska Building, Seattle, Washington.

Dated at Seattle, Washington, August 24th, 1916.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT, SHORTS,
Proctors for Appellant, Fireman's Fund Insurance Company.

[Endorsed]: Copy of within Bond and Notice received and due service thereof acknowledged this 24th day of August, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Canadian Pacific Railway Company.

GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Pacific Alaska Navigation Co. and Alaska Pacific Steamship Co.

(Filed Aug. 24, 1916.) [38]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of THE CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Assignment of Errors.

Comes now the Fireman's Fund Insurance Company, one of the claimants in the above-entitled proceeding and appellant herein, and says that in the decision and final order and decree in this cause there is manifest and material error, and said appellant now makes, files and presents its Assignment of Errors on which it relies, to wit:

I.

That the District Court erred in refusing and

disallowing the Fireman's Fund Insurance Company interest upon its claim in the principal sum of $31,392.04 prior to June 12, 1916, in the order and decree of the District Court signed and entered on the 24th day of August, 1916.

Said appellant files and presents this its Assignment of Errors and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States thereto relating, and said appellant prays a reversal of that portion of the aforesaid order and decree heretofore made and entered in this proceeding and appealed from by this appellant refusing and disallowing it interest upon its claim prior to June 12, 1916, and appellant further prays for such other and further relief as shall be deemed meet and equitable. [39]

Dated at Seattle, Washington, this 24th day of August, 1916.

McCUTCHEN, OLNEY, WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT & SHORTS,

Proctors for Appellant and Claimant, Fireman's Fund Insurance Company.

(Filed Aug. 24, 1916.) [40]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of THE CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Stipulation as to Contents of Apostles on Appeal.

WHEREAS, Fireman's Fund Insurance Company, a corporation, one of the claimants in the above-entitled proceeding, has pursuant to Rule 3 of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit exercised its option to state and has stated in its notice of appeal herein that it desires only to review one question involved in this proceeding, which question is clearly and succinctly stated in its notice of appeal,

NOW, THEREFORE, In pursuance of Section 3 of Rule 4 of the aforesaid Rules in Admiralty, it is hereby stipulated by and between the proctors for the undersigned parties that the Apostles on Appeal may contain only such papers and proceedings as are necessary to review the question raised by the appeal of said Fireman's Fund Insurance Company, the same being:

1. Petition of Canadian Pacific Railway Company and Monition.

2. Answer and Claim of Fireman's Fund Insurance Company.

3. Stipulation between Canadian Pacific Railway Company, Fireman's Fund Insurance Company, and others, dated August 26, 1915.

4. Decree of Limitation of Petitioner's Liability.

5. Stipulation between Canadian Pacific Railway Company, Fireman's Fund Insurance Company, and others, dated June 12, 1916.

6. Decree and Order of the District Court dated August 24, [41] 1916.

7. Notice of Appeal by Fireman's Fund Insurance Company.

8. Cost Bond on Appeal of Fireman's Fund Insurance Company, and Notice of Filing Same.

9. Assignment of Errors of Fireman's Fund Insurance Company.

10. This stipulation.

Dated at Seattle, Washington, this 24th day of August, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Canadian Pacific Railway Company.

GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Pacific Alaska Navigation Company and Alaska Pacific Steamship Company.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT, SHORTS,
Proctors for Appellant, Fireman's Fund Insurance Company.

We, the proctors for appellant herein, hereby expressly waive the provisions of the Act of Congress approved Feb. 13, 1911, relating to appeals, and direct that the appeal in this cause be prosecuted in accordance with the rules and practice of the U. S. Circuit Court of Appeals for the Ninth Circuit.

McCUTCHEN, OLNEY, WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT, SHORTS,
Proctors for Appellant, Fireman's Fund Insurance Company. **[42]**

Certificate of Clerk U. S. District Court to Apostles on Appeal.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify the foregoing pages numbered from 1 to 42 inclusive, to be a full, true, and correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by the stipulation of proctors herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitutes the Apostles on Appeal to the said United States Circuit Court of Appeals for the Ninth Circuit from the United States District Court for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on or behalf of the appellant for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 82 folios at 15¢	$12.30
Certificate of Clerk to transcript of record 2 folios @ 15¢	.30
Seal to said certificate	.20
Total	$12.80

I hereby certify that the above cost of preparing and certifying record amounting to $12.80 has been paid to me by Messrs. McCutchen, Olney & Willard, Ira A. Campbell, and Ballinger, Battle, Hulburt & Shorts, Proctors for appellant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the **[43]** seal of said District Court at Seattle, in said District, this 25th day of August, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk United States District Court, Western District of Washington. **[44]**

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 2829.

In the Matter of the Petition of THE CANADIAN PACIFIC RAILWAY COMPANY, a Corporation of the Dominion of Canada, Owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

Notice of Appeal.

To Messrs. Bogle, Graves, Merritt & Bogle, Proctors for Petitioner, Canadian Pacific Railway Company.

To Messrs. Grosscup & Morrow, and Jones & Riddell, Proctors for Pacific Alaska Navigation Company and Alaska Pacific Steamship Company, Claimants herein, and

To Frank L. Crosby, Clerk of the Above-entitled Court:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, That Fireman's Fund Insurance Company, a corporation, one of the claimants in the above-entitled proceeding, whereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the final order and decree made and entered herein on the 24th day of August, 1916, refusing and disallowing interest upon the principal amount of said claimant's claim, to wit, $31,392.04, prior to June 12, 1916.

Dated at Seattle, Washington, August 24th, 1916.

McCUTCHEN, OLNEY & WILLARD,
IRA A. CAMPBELL,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Claimant and Appellant, Fireman's Fund Insurance Company. [45]

[Endorsed]: No. 2829. In the United States District Court, for the Western District of Washington, Northern Division. In Admiralty. In the Matter of the Petition of the Canadian Pacific Railway Company, a corporation of the Dominion of Canada, Owner of the Steamship "Princess Victoria," for Limitation of Liability. Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 24, 1916. Frank L. Crosby, Clerk. By F. L. C., Deputy.

Copy of within Notice of Appeal received and due service thereof acknowledged this 24th day of August, 1916.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Canadian Pacific Railway Co.
GROSSCUP & MORROW,
JONES & RIDDELL,
Proctors for Pacific Alaska Navigation Co., and Alaska Pacific Steamship Co.

[Endorsed]: No. 2850. United States Circuit Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Company, a Corporation, Claimant

of the Steamship "Princess Victoria," Her Engines, etc., Appellant, vs. Canadian Pacific Railway Company, a Corporation of the Dominion of Canada, Owner of the Steamship "Princess Victoria," Her Engines, etc., Pacific Alaska Navigation Company, a Corporation, and Alaska Pacific Steamship Company, a Corporation, Claimants, Appellees. In the Matter of the Petition of the Canadian Pacific Railway Company, a Corporation of the Dominion of Canada, Owner of the Steamship "Princess Victoria," for Limitation of Liability. Apostles on Appeal. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 28, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2850

12

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

BRIEF FOR APPELLANT.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

Filed this.....day of September, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

BRIEF FOR APPELLANT.

Statement of the Case.

This appeal is prosecuted from the decree of the District Court for the Western District of Washington,

Northern Division, disallowing interest in favor of appellant, an insurer of certain cargo lost on the steamship "Admiral Sampson" in the collision between that vessel and the steamship "Princess Victoria," from the date of the collision, to wit, August 26, 1914.

Appellant, together with a large number of underwriters, had insured the cargo on board the "Admiral Sampson". Shortly after the loss of that vessel and her cargo, appellant paid its insured the value of the cargo and became subrogated to all of the latters' rights against appellees. Appellant thereafter appeared in the proceedings instituted by the Canadian Pacific Railway Company, owner of the S. S. "Princess Victoria," to limit its liability, and filed its claim and answer, setting up its claims and demands.

By its interlocutory decree, the lower court determined that said appellee was entitled to a limitation of its liability to the appraised value of the "Princess Victoria," to wit, the sum of $286,225.10.

Subsequently, after considerable negotiations between the respective parties, the principal amount of appellant's damages, to wit, the sum of $31,392.04 was agreed upon. The question of allowance of interest, however, was expressly reserved for the court. When the matter came before the learned District Judge Neterer, he declined to allow interest from the date of the collision on the principal sum found due. A decree was then entered by Judge Cushman following the oral ruling of Judge Neterer fixing the principal amount of the damages suffered by the cargo claimants, including

appellant. The decree, however, expressly disallowed interest from the time of the collision, or any time prior to June 12, 1916, the day upon which the stipulation agreeing upon the principal amount of the damages was entered into.

It was also stipulated between the parties that the collision and the loss and damage approximately resulting therefrom were caused by the mutual fault and negligence of both vessels.

The question before the court, therefore, is whether or not in cases of collision, where both vessels are held in fault, an innocent cargo owner, or his insurer, is entitled to interest, from the time of the collision upon the principal sum found due it from the vessel in fault other than the one carrying the cargo.

The appellees and other underwriters interested, although they have not appealed from the decree disallowing them interest, have agreed as respects their claims to abide by the decision of this court in the present case.

Specification of Error.

Error has been assigned in the Apostles on Appeal to the decree of the District Court, as follows:

That the District Court erred in refusing and disallowing the Fireman's Fund Insurance Company interest upon its claim in the principal sum of $31,392.04, prior to June 12, 1916, in the order and decree of the District Court signed and entered on the 24th day of August, 1916.

The Argument.

The collision between the "Princess Victoria" and the "Admiral Sampson" occurred on August 26, 1914. The decree disallowing interest from the time of the collision, and from which this appeal is prosecuted, was made and entered on the 24th day of August, 1916.

It is thus apparent that since August 26, 1914, the cargo owners and their insurers have been deprived of their property or its equivalent, the value of it. Furthermore, they have been out of the use of the money admittedly due them, but withheld by the Canadian Pacific Railway Company.

Obviously, therefore, by the action of the lower court, they are not allowed the measure of damages universally applied in such cases. Their right against appellee is for a *restitutio in integrum.* They should be placed in the same situation as they were in on the day of the collision, more than two years ago. The object sought, in awarding damages in such cases, is to place the owners of the cargo as nearly as may be in the same position as if the collision had not occurred. Any other rule would not compensate them or make them whole.

The Supreme Court has said:

> "* * * It is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted."
>
> *The Cayuga,* 14 Wall. 270; 20 L. Ed. 828.

See also

The Baltimore, 8 Wall. 377; 19 L. Ed. 463.

Manifestly, by allowing appellant the value of the cargo lost and disallowing interest on that sum, it is not being placed in the same position as if the collision, for which it is in no manner responsible, had not occurred. If interest is to be withheld, upon what theory can it be said that the leading maxim in such cases, *restitutio in integrum,* has been applied?

Certainly a cargo owner, above all parties affected by a collision, should be given the benefits of the rule universally applied in collision cases, both in England and in this country.

In

The Atlas, 93 U. S. 302; 23 L. Ed. 863, 7-8,

the Supreme Court said:

> "Goods shipped as cargo, and their owners, as in the case before the court, are innocent of all wrong; * * * and, having proved their case, they are as much entitled to full compensation in the admiralty as they would have been if they had elected to pursue their common law remedy, saved to them by the proviso contained in the 9th section of the Judiciary Act."

What, then, did the court mean when it there said that the innocent cargo owner was entitled to "full compensation"? The answer is found in the repeated decisions of that court and the lower federal courts. For instance, in

The Scotland, 105 U. S. 24; 26 L. Ed. 1001, the Supreme Court had before it a case arising out of a collision between the steamship "Scotland" and the

American ship "Kate Dyer". The "Kate Dyer" sank, and with her cargo, was totally lost. Subsequently, the benefits of the Act of Congress creating an act to limit the liability of shipowners, sections 4283-4289, of the Revised Statutes, were claimed by the National Steam Navigation Company.

The situation before the court, it will be noted, was therefore identical with the facts present in this case. In speaking of the measure of damages, the court said:

> "The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the circuit court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and *interest.*"

In the judgment there referred to and affirmed, Circuit Judge Blatchford said:

> "But, the result of the principles laid down in the cases cited and considered, was held to be, that the proper rule of damages was the value of the cargo * * * *with interest at six per cent. from the time of the collision.*" (Citing cases.)
>
> *Dyer et al. v. National Steam Nav. Co.,* Fed. Cas. 4225; 8 Fed. Cas. 210.

The reason for the rule is apparent. The cargo owner and his insurer are entitled to a complete indemnity for the loss sustained by reason of the tort, and the interest is regarded as a part of the indemnification or damages awarded. It becomes necessary to allow interest in cases of delay in payment, because the

innocent cargo owner and his insurer have been deprived of the use of the money found due from the time of the collision. Appellant, together with the other insurers interested, would, without an allowance of interest, suffer a great loss, whilst for the whole of the intervening period the appellee has had the use and enjoyment of the money, and has been in a position to make profit out of it. Certainly the court will not permit such a result without just cause.

A shipowner is entitled to interest from the date of the collision.

Interest has been uniformly allowed in favor of a shipowner in collision cases from the time of the collision.

In

The Reno, 134 Fed. 555,

the Circuit Court of Appeals for the Second Circuit said:

> "The damages sustained by the owner of a vessel which is sunk in a collision, when the vessel is a total loss, is her value at the time of the loss, *to which interest may be added to afford complete indemnity.*"

In

The Cumberland, 135 Fed. 234,

it was said:

> "Where loss of value is awarded, *interest is ordinarily allowed from the collision to the time of payment.*"

In

The J. S. Gilchrist, 173 Fed. 666-672,

in speaking of the allowance of interest from the time of the collision, the court said:

> "The reason for the rule is that the party damaged is entitled to a complete return for the loss sustained by reason of the tort, and *the interest is regarded as a part of the indemnification or damage award.*"

In

The Rabboni, 53 Fed. 952-57,

Circuit Judge Putman said:

> "When not more than the value of the vessel and pending freight is given, *interest should justly be added, to make complete restitution.*"

The Circuit Court of Appeals for the Fifth Circuit, in

Galveston Towing Co. et al. v. Cuban S. S. Co., Limited, 195 Fed. 711,

speaking through Judge Pardee, said:

> "Error is claimed in allowing interest beyond the date of the decree, but *we think the only error in the matter was that interest was not allowed from January 20, 1909, the time of the collision.*"

In

North Shore Staten Island Ferry Co. v. The Huguenots, Fed. Cas. 10330; 18 Fed. Cas. 381,

the court said:

> "The libelant is entitled to full indemnification for the injury sustained, *and interest must be allowed,* or he will not receive such indemnification."

Similar expressions are found in many of the reported cases. They are too numerous to quote further from them. Suffice it to say that interest has been allowed in the following additional cases:

The Aleppo, Fed. Cas. 158;
The Mary Eveline, Fed. Cas. 9212;
The Morning Star, Fed. Cas. 9817;
The Grapeshot, 42 Fed. 504;
The Bulgaria, 83 Fed. 312;
The Illinois, 84 Fed. 697;
The Oregon, 89 Fed. 520;
The Mahanoy, 127 Fed. 773;
The Manitoba, 122 U. S. 97, 30 L. ed. 1095.

The rule in England is to allow interest in such cases from the time of the collision. Speaking of the rule Sir Charles Butt, in

The Kong Magnus, 1891, Probate Div. 223, 235,

where the question of interest was the only matter before the court, said:

> "* * * the view of the Court of Admiralty has been that the person liable in damages, having kept the sum which ought to have been paid to the claimant, and having therefore been able to receive interest upon it, ought to be held to have received it for the person to whom the principal was payable. * * * a clear and uniform rule has long existed in the Court which this tribunal now represents, and that rule has been, I understand, approved at least in one case by the Court of Appeal. I cannot therefore depart from it, and am bound to hold, somewhat against my inclination, that the plaintiffs are entitled to recover this interest."

See also

The Gertrude, 13 Probate Div. 105,

a decision by the English Court of Appeal.

A cargo owner or his insurer is entitled to interest from the date of the collision.

Thus it is apparent that interest from the date of the collision has been uniformly allowed to a shipowner in collision cases.

Why should a different rule be applied to the cargo owner or his insurer in a similar case? No reason is apparent, and we confidently assert that no tenable reason for such action can be advanced. On the contrary, there is every reason for giving the innocent cargo owner a complete indemnification, if anyone is to be made whole.

No consideration such as the fault of one vessel being greater than the other to the collision, can be indulged in. The actions of the cargo owners and their insurers are not involved. They are innocent of all wrong. No reason, we submit, exists to change or modify the rule when their interests are before a court. Certainly no reason, sufficient to justify the disallowance of interest is apparent in the present case.

The proper rule to be followed in cases of this kind, and which rule was ignored without sufficient cause by the District Court in the present instance, was announced by the Supreme Court of the United States as early as 1824, in

The Apollon, 9 Wheaton 361, 6 L. ed. 111,

and again in

The Scotland, supra.

In *The Apollon,* the court said:

> "Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, *together with interest upon the amount, from the time of the trespass.*"

Subsequently, the Court of Appeals for the Second Circuit, in

The Umbria, 59 Fed. 489,

followed it, the court saying:

> "In some of the causes the cargo was a total loss, none of it having been recovered from the sunken vessel. In such cases, the correct rule of damages is to allow the value of the cargo at its place of shipment, or its cost, including expenses and charges and insurance *and interest.*"

In the case of

Pacific Ins. Co. v. Conard, F. C. 10647, 18 F. C. 946-8-9,

the court said:

> "In marine trespasses the Supreme Court have, at different times, laid down the following as the rule of damages, in cases unaccompanied with aggravation. In (Murray v. The Charming Betsy) 2 Cranch (6 U. S.) 124, (Head v. Providence Ins. Co.) Id. 156, the actual prime cost of the cargo, *interest,* insurance, and expenses necessarily sustained by bringing the vessel into the United States. In (Del Col v. Arnold) 3 Dall. (3 U. S.) 334, the full value of the property injured or destroyed; counsel fees rejected as an item of damage. (Arcambel v. Wiseman) Id. 306. In (The Anna Maria) 2 Wheat. (15 U. S.) 335, the prime cost

> of the cargo, all charges, insurance and *interest.* In (The Amiable Nancy) 3 Wheat. (16 U. S.) 560, the prime cost, or value of the property at the time of loss, or the diminution of its value by the injury, and interest. In The Lively (Case No. 8,403), the prime cost and *interest.* In (The Apollon) 9 Wheat. (22 U. S.) 376, 377, where the vessel and cargo are lost or destroyed, their actual value, *with interest* from the trespass."

In

The Alexandria, F. C. 178,

the libelants' claim to interest was disallowed. Upon appeal to the court, it was said.

> "It seems to me that the libelants are entitled to interest. * * * *Their indemnity obviously will not be complete unless interest is allowed."*

See also

25 Am. & Eng. Ency. of Law, 2nd Ed., p. 1038.

The reasons which induced the courts to allow interest to the shipowners in the numerous cases previously cited apply with greater force when considering the rights of an innocent cargo owner or his insurer. Because of their great number which but repeat the principle we refrain from quoting from the cases in which interest has been allowed to the cargo owner, contenting ourselves with calling the court's attention to a few of the many cases where the rule has been followed, viz.:

The Mary J. Vaughan, F. C. 9217 (Affd. 81 U. S. 258; 20 L. ed. 807;

The Ocean Queen, F. C. 10410;

The City of New York, 23 Fed. 616;

The Beatrice Havener, 50 Fed. 232;
The Eagle Point, 136 Fed. 1010;
The Beaver, 219 Fed. 134;
Union S. S. Co. v. Latz, 223 Fed. 402;
American-Hawaiian S. S. Co. v. Strathalbyn S. S. Co. (unreported), *No. 2728 of the records of this court.*

See also

Roscoe on Damages in Maritime Cases, pp. 29-100.

In fact in every case of which we have any knowledge, but the present one, the courts of this circuit have allowed interest from the time of the collision.

If, therefore, as stated by the Supreme Court, a cargo owner is entitled to full compensation in such cases, i. e., its value at the time of the collision, with interest from that date, we respectfully submit that the disallowance of interest in the present instance is not the giving of full compensation or an application of the rule *restitutio in integrum.*

The discretion of the court.

We are not unmindful of the decisions in which it has been held that the allowance of interest on damages rests very much in the discretion of the tribunal which has to pass upon the subject.

The Albert Dumois, 177 U. S. 240, 256; 44 L. ed. 751,

where the court said:

> "The allowance of interest in admiralty cases is discretionary, and not reviewable in this court *except* in a very clear case."

Our contention is that we come to this court with "a very clear case". The present appeal is much stronger than the one entertained by the Court of Appeals for the Second Circuit in

Milburn v. Thirty-Five Thousand Boxes of Oranges and Lemons et al., 57 Fed. 236,

where the action of the lower court in disallowing a libelant interest was reversed with instructions to give interest upon the amount found due.

See also

The Gertrude, supra.

We contend that there must be some adequate reason for the disallowance of interest in such a case as the present one before there is any reason or necessity for the application of the trial court's discretion. Manifestly, discretion does not mean the mere whim of the judge. It is not a capricious or arbitrary discretion that is intended, but an impartial, sound discretion guided and controlled in its exercise by fixed legal principles. It is not a mental discretion to be exercised *ex gratia,* but a legal discretion to be exercised in conformity with the spirit of the law on the subject, and in a manner to subserve and not to impede or defeat the ends of substantial justice. Equitable considerations should be present before there is even any room for the exercise of this discretion. It must be exercised for reasonable cause.

In a plain case, such as the one now before the court, discretion has no office to perform. Its exercise is

limited to doubtful cases where an impartial mind hesitates.

"Discretion," says the Supreme Court, "should not be a word for arbitrary will or inconsiderate action." "Discretion means the equitable decision of what is just and proper under the circumstances."

The Styria, 186 U. S. 1; 46 L. ed. 1027.

With that guiding test before the court how can the disallowance of interest in the present case be justified? Certainly no equitable consideration is present. There is no reason for thus penalizing the appellant or any of the other insurers. Appellant was forced to litigate and prove its claim. By appellee's action, it has been deprived of the use of its money for over two years. No action that it took in any manner occasioned appellee to suffer any loss or any hardship. It was in no manner to blame for the collision or the resulting litigation. On the contrary, it was an innocent party in the whole matter, patiently waiting for the sum admittedly due it, for it must be remembered that appellee confessed its fault for the collision which caused appellant's loss.

We feel, therefore, that no sufficient cause, no special reason, exists for the refusal of the court to follow the proper and customary rule and give appellant full compensation.

No consideration of the degree of fault such as called for the exercise of the court's discretion in allowing and withholding interest in *The North Star,* 44 Fed. 492; 62 Fed. 71, is here present. Neither is there any question about a vessel being materially bettered by the

repairs, or there being any doubt as to the extent of the damages, matters which were considered in the disallowance of interest in

The Alaska, 44 Fed. 498.

So, too, the long delay considered by District Judge Donworth in

Compagnie De Navigation Francaise v. Burley et al., 183 Fed. 166,

is not involved.

See the report of his conclusions in 194 Fed. 335, p. 336.

In such cases there may be some reason, in the exercise of the court's sound discretion, to disallow or reduce the usual rate of interest.

It is difficult, however, to imagine a case where there is less room for the exercise of a sound legal discretion, upon the question of the allowance of interest, than the present one. If the rule allowing interest is to be a rule and not mere judicial whim, then it certainly should have application in a case of the kind now before the court. No reason or consideration, if there be any, that could by any stretch of the imagination be invoked against the shipowners involved in this collision can be advanced to support the action of the lower court.

A cargo owner, says the Supreme Court,

> "* * * ought not to suffer loss by the desire of the court to do justice between the wrongdoers."
>
> *The Alabama and The Gamecock,* 92 U. S. 695; 23 L. ed. 763.

Manifestly, those words should be given some effect in this case. The appellant who is subrogated to the rights of the innocent cargo owner is similarly situated. It is thus entitled to the full compensation to which the Supreme Court has said an *innocent* cargo owner is justly entitled.

We respectfully submit, therefore, that the decree of the District Court should be reversed with directions to allow appellant interest from the date of the collision, on the principal sum found due.

Dated, San Francisco,
September 29, 1916.

Respectfully submitted,
IRA A. CAMPBELL,
MCCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant.

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No. 2850

In the United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "Princess Victoria," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "Princess Victoria," for Limitation of Liability.

BRIEF FOR APPELLEE, CANADIAN PACIFIC RAILWAY COMPANY.

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BRIEF FOR APPELLEE, CANADIAN PACIFIC RAILWAY COMPANY.

On August 26, 1914, the steamers "Admiral Sampson" and "Princess Victoria" collided in the waters of Puget Sound, as a result of which collision the steamer "Admiral Sampson," together with her entire cargo, became a total loss. Immediately after the

happening of the said collision, the owners of the "Admiral Sampson" libeled the "Princess Victoria," claiming damages in the sum of $670,000 (Ap. p. 8). On August 29th, after the filing of the aforesaid libel, the Canadian Pacific Railway Company, as owner of the Steamship "Princess Victoria," filed a petition for a limitation of its liability. Monition was duly issued and published. Appraisers were appointed and the interest of this appellee as such owner was fixed at the sum of $286,225.10, and, on November 5, 1915, an interlocutory decree was entered limiting this appellee's liability to the said sum of $286,225.10. On January 26, 1915, the appellant herein, as insurer of cargo aboard the "Admiral Sampson" at the time of her loss, filed its claim in said limitation proceeding for the sum of $31,407. On August 26, 1915, a stipulation was entered into between this appellee, as owner of the steamship "Princess Victoria," Pacific Alaska Navigation Company and Alaska Pacific Steamship Company, as charterer and owner, respectively, of the steamship "Admiral Sampson," as parties of the first, second and third parts, respectively, and Fireman's Fund Insurance Company and other insurers of cargo, as parties of the fourth part, wherein it was agreed that as to the claim of said appellant and other insurerers of cargo, the mutual fault of both of said colliding steamers was admitted; and further, that the said cargo claimants should be paid in full before any portion of the claims

of the other parties was paid, and that unless the amount of the cargo claims were agreed upon, the same should be established by competent proof. (Ap. pp. 24-26.) Thereafter, on June 12, 1916, a further stipulation was entered into between the same parties fixing the amount of the claims of said cargo claimants—the claim of this appellant being fixed at $31,-392.04. It was therein agreed that the appellant and other cargo claimants:

> "Contend that they are entitled to recover, in addition to the principal amount of their respective claims as aforesaid, interest thereon at the rate of 6% *from the several dates of payment of the items constituting their respective claims,* and the fourth parties further contend that they are also entitled to recover their taxable costs. First, second and third parties deny the right of fourth parties to recover interest and costs as contended for by fourth parties." (Ap. p. 32.)

And in order to finally dispose of said claims it was further stipulated that the court might enter a decree allowing the respective cargo claims in the amounts stated in said stipulation, and that "the question of the rights of fourth parties to recover interest and costs as aforesaid shall be submitted to the court for determination."

These questions were submitted to the court in accordance with said stipulation, on June 12, 1916, and the lower court, after said questions had been fully argued and submitted to it, on the same date, made its oral decree fixing the amount of the claims

"with costs and interest from June 12, 1916, but without interest prior to said date." Some months thereafter, on Aug. 24, 1916, a written decree was prepared and filed in the cause in accordance with said oral decree (Ap. pp. 33-35). This appeal is from that portion of the decree of the lower court disallowing interest prior to June 12, 1916. The principal amounts of the respective cargo claims, including the claim of this appellant, together with taxable costs, have been fully paid and the sole question before this court on this appeal is that of the disallowance of interest on appellants claim prior to June 12, 1916.

ARGUMENT.

Appellant contends that it is entitled as a matter of right to interest on its claim from the *date of the collision* to the date of the final payment. The court will note, however, that this was not the contention of the appellant in the lower court, and that no such question was presented to or passed upon by the lower court. The stipulation of the parties agreeing to the submission of this case to the lower court prior to the final hearing of the entire cause, dated June 12, 1916, expressly provides in paragraph 2 thereof that the appellant contends that it is entitled to interest on its claim from *"the several dates of payment of the items constituting such respective claims."* (Ap. p. 32.)

This stipulation as to appellant's contention, was all that appellant and other insurers of cargo, could

legally claim. An insurer of cargo does not stand in the same position as a cargo owner. An insurer's claim arises on the date when he pays the loss. To allow an insurer interest on the amount of a cargo loss *prior* to the time when such insurer has actually paid such loss would be contrary to the doctrine well established in this county that

"The insurer's right of subrogation in equity could not extend beyond recoupment or indemnity for the actual payments to the assured."

The St. Johns, 101 Fed. 469, 475,
Norwich Union Fire Ins. Co. v. Standard Oil Co , 59 Fed. 984,
Fairgrieve v. Marine Ins. Co., 94 Fed. 686,
The Livingstone, 130 Fed. 747.

Any doubt on this question, however, is foreclosed by appellant's stipulation as to its contention below. It is elementary law that this court will not consider a question which was not presented to or considered by the lower court.

Benedict on Admiralty (4th Ed.) §566.

The lower court, with the entire record in this cause before it, and upon the stipulation of the parties as to the questions to be presented to it, decided that cargo claimants, including this appellant, were not entitled under the circumstances of this case to an allowance of interest from the dates when they had paid the respective cargo owners the amount of their respective insurance. That was the sole question before

the lower court and, of course, is the only question which appellant can raise in this court. The record which appellant has brought to this court does not show the date or dates when the appellant paid cargo owners, which were insured by it, the amount of their respective claims.

The record which appellant has brought to this court shows that appellant's claim herein covers amounts paid by it on twenty different shipments of cargo (Ap. p. 21-22). But it nowhere shows the "several dates of payment of the items constituting such respective claims." There is, therefore, nothing in the record before this court upon which it could base an allowance of interest.

ALLOWANCE OF INTEREST, AS DAMAGES, IN ADMIRALTY CASES IN DISCRETION OF TRIAL COURT.

The Admiralty Courts of this country have uniformly held that the allowance or disallowance of interest and costs in collision cases is in the sound discretion of the trial court dependent upon the equities and circumstances of each particular case. Neither a ship owner nor a cargo owner is entitled to either interest or costs as a matter of *right* in such cases, and when interest is allowed it is allowed as a part of the damages and not strictly as interest.

In *The Scotland,* 118 U. S. 507, (being second appeal to the U. S. Supreme Court of case referred to by appellant on page 6 as *Dyer v. National Steam Nav. Co.,* Fed. Cas. 4225, and again on page 5, as *The Scotland,* 105 U. S. 24), the Supreme Court passing upon the contention of claimants, in a Limitation of Liability case, that they were entitled to interest on the amount received from the strippings of a sunken vessel, stated:

"Were the libellants entitled to interest on the amount received from the strippings? In answering this question it must be borne in mind that this *is not* a *question of debt, but of damages.* The limitation of those damages to the value of the ship does not make them cease to be damages. The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case and rests very much in the discretion of the tribunal which has to pass upon the subject whether it be a court or a jury (at pages 518-519)

"In Admiralty, interest on claims arising out of breach of contract is a matter of right, but the allowance of interest on damages in cases of collision or other *unliquidated* damages is always in the discretion of the Court and may be allowed or disallowed by the District Court.

Benedict on Admiralty (4th Ed) §474.
The Albert Dumois, 177 U. S. 240, 255,
Hemenway v. Fisher, 20 How. 258,
Burrows v. Lownsdale, 133 Fed. 250,
The Eliza Lines, 132 Fed. 242.

"While interest is allowable, as a matter of right, on claims arising out of contract, the allowance of interest by way of damages in cases of collision and

other cases of pure damages, as well as the allowance of costs, is in the discretion of the court."

Bethell v. Mellor, etc. Co., 135 Fed. 445.

This court, in the case of *La Conner Trading & Transportation Co. v. Wedmer,* 136 Fed. 177, refused to consider the action of the lower court with respect to the allowance of interest on damages, upon the ground that such action was discretionary with the trial court.

"The allowance of interest on damages depends upon circumstances, and rests in the discretion of the Court. *The Scotland,* 118 U. S., 507, 518 (at p. 178)."

See also *Thompson Towing & Wrecking Assn. v. McGregor,* 207 Fed. 209—note bottom page 221,
The Argo, 210 Fed. 872, 875.

NO APPEAL LIES FROM DECREE DISALLOWING INTEREST, WHERE THAT IS THE SOLE QUESTION INVOLVED.

It has been uniformly held that the giving or withholding of *costs and expenses* is a matter in the sound discretion of the trial court and is not subject to review where that is the sole question involved.

In the early case of *Canter v. Insurance Co.,* 3 Pet. 307, the Supreme Court of the United States held that the allowance of costs and expenses

"are not matters positively limited by law, but are allowed in the exercise of a *sound discretion* of the

court, and besides, it may be added that *no appeal* lies from a mere decree respecting costs and expenses."

This has since been the uniform holding of Admiralty and Equity Courts.

> *Elastic Fabric Co. v. Smith,* 100 U. S. 110,
> *Paper Bag Machine Cases,* 105 U. S. 766,
> *Russell v. Farley,* 105 U. S. 433,
> *Du Bois v. Kirk,* 158 U. S. 58,
> *The Eva D. Rose,* 166 Fed. 106.

The matter of costs and expenses not being *per se* the proper subject of appeal, can only be considered by an appellate court, incidentally as connected with an appeal on the merits.

> *U. S. v. Brig Malek Adhel,* 2 How. 210, 237,
> *Blassengame v. Boyd,* 178 Fed. 1, 5.

"In equity and in admiralty the taxation of costs, as between the parties, is a matter of sound legal discretion, and for this reason it is said that generally an appeal will not lie alone from a decree taxing costs (citing cases). But if the appeal be also upon the merits, the Court having the whole decree before it, may also consider the action of the Court in this respect, upon a proper assignment of errors (citing cases)."

> *In re Michigan Cent. R. Co.,* 124 Fed. 727, 732,
> *The Scotland,* 118 U. S. 507, 519.

The reason for this rule is apparent. An appellate court will not entertain an appeal where the *sole question sought to be reviewed was a discretionary act of the lower court.*

In the case of *In re Michigan Cent. R. Co.,* 124 Fed. 727, cited from above, the court clearly points out the reason for this rule.

"But in all cases cited, except that of *Wood v. Weimer, supra,* the taxation was between the parties in either admiralty or equity causes, and the *only question was as to the exercise of a sound discretion* in the disposition of the costs as between the parties. *The ground upon which the right of appeal was denied was because the question was not one of positive law, but of discretion.* (Italics ours.)

In re Michigan Central R. Co., 120 Fed. at p. 732.

"When a matter is in the discretion of the court, the exercise of that discretion is not reviewable in the appellate court."

Cape Fear Towing & Trans. Co. v. Pearsall, 90 Fed. 435, 437,
Charles v. United States, 183 Fed. 566.

In the case at bar, appellant has not appealed on the merits, but only from that portion of the decree disallowing interest prior to the decree, i. e., from the decree of the lower court refusing to allow the full amount of damages claimed.

The reason for the rule applies even more forcibly to the discretionary act of a trial court in disallowing interest as part of damages claimed than it does to the allowance of cost and expenses. Certain items of cost are now fixed by statute and follow a decree as a matter of right and are thus no longer discretionary with the trial court.

In re Michigan Central R. Co., 124 Fed. 727. Interest, however, is in all cases discretionary. A trial court with the entire litigation clearly before it is in a particularly advantageous position to understand the equities as between the litigants, and with such understanding to exercise its discretion as to the equity of allowing or disallowing interest to such litigants.

If an appellant court will not entertain an appeal respecting costs and expenses alone, upon what principle could it entertain an appeal respecting interest alone? In both cases the action of the trial court in the premises is purely discretionary, and the appeal is from the well established discretionary power of the court.

THE APOSTLES DO NOT SHOW THE "CIRCUMSTANCES OF THE CASE" WHICH GUIDED LOWER COURT IN EXERCISING ITS DISCRETION.

Appellant contends, however, that an appellate court not only has the power to entertain an appeal respecting *interest alone,* but that in a "clear case" such appellate court should allow a cargo claimant such interest as a matter of right. This, we think, is not the rule, but even though it were, it would have no application here.

Appellant comes before this court with the barest skeleton of a record and from such record argues that under the "particular circumstances" of this case the lower court abused the discretion inherent in it, by disallowing interest. This raises a pure question of fact, with absolutely no record from which this court can determine what the actual facts were which guided and influenced the lower court in exercising its discretion.

This litigation has been pending for over two years—it was a most serious collision—not only was the "Admiral Sampson," together with her cargo, totally lost, but many lives and much other property were lost as well. (ap. p. 6.) The litigation arising from such a disaster would necessarily be very extensive. This entire litigation was before the lower Court. None of it, excepting this one claim, out of a hundred, is before this court, and this one in its merest skeleton form.

It would be absurd to argue that this Court, from the record before it, was conversant with the "particular circumstances" of this case, so as to enable it to say, as a matter of fact, that the lower Court, in disallowing interest, acted "arbitrarily", without "adequate reason," "capriciously" or without "reasonable cause." Appellant would have this Court so find.

Appellant says (p. 14 of its brief):

"In a plain case such as the one now before the Court discretion has no office to perform. Its exercise is limited to doubtful cases where an impartial mind hesitates."

In making this statement appellant apparently refers to the case as disclosed in its Apostles on Appeal. These apostles show merely that after the happening of this collision, this appellee, as the owner of the Steamship "Princess Victoria," which had been libeled for a sum greatly in excess of the value of said steamer and which was being threatened with numerous other libels, filed a petition for limitation of its liability, if any, and prayed for a total exemption of liability; (Ap. pp. 4-12) that monition was duly issued and returned; (Ap. pp. 13-16) and that some months thereafter, or on January 27, 1915, this appellant filed its claim for $31,407. (Ap. pp. 16-23.) No further proceedings of the Court in the premises are shown until August 26th, 1915, when a stipulation was entered into, the result of which being an agreement on the part of this appellee and the owners of the "Admiral Sampson" to pay the claim of appellant in full as soon as the same could be agreed upon .(Ap. pp. 24-26.) That a decree was subsequently entered limiting the liability of this appellee; (Ap. pp. 27-29) that on June 12th, 1916, a further stipulation was made fixing the amount of this appellant's claim *at less* than the amount of the claim as filed, and agreeing that the

question of appellant's right to interest from the date when it had actually paid the respective items of its claim and the question of its right to taxable costs should be submitted to the Court. (Ap. pp. 30-33.) That on the very date (June 12, 1916) when appellant's claim was agreed upon, in accordance with the prior stipulation of the parties, the remaining contentions as to appellant's right to interest and costs were submitted to and determined by the lower Court. (Ap. pp. 33-35.) There is absolutely nothing in the record before this court to show what influenced this appellee to enter into the stipulation of August 26, 1915, admitting its liability and agreeing to pay the appellant in full. This stipulation is distinctly to the advantage of the appellant. It relieved appellant from the necessity of litigating its claim and established the liability of this appellee to pay appellant's claim when agreed upon. The "Admiral Sampson" having become a total loss, appellant's only chance of recovering any damages in this litigation was to establish the liability of this appellee. That liability had been strenuously denied by this appellee and a considerable amount of testimony had been taken in the case. Can this Court say what the facts and circumstances were which moved this appellee to waive its entire defense and to admit its liability as to this appellant, and to absolutely agree to pay its claim without qualification upon the correctness thereof being agreed upon?

The Court, in this connection, will note that this stipulation is in favor of appellant and the other cargo claimants alone, and that as to the numerous other claims for death, personal injury and loss of property, etc., this appellee did not admit any liability whatsoever.

We contended below that this stipulation, in connection with the circumstances causing appellee to agree thereto as well as numerous other facts which were before the lower court, estopped appellant from claiming interest prior to June 12, 1916. It is apparent from the decree of the lower Court that it agreed with our contention, and, in the exercise of its discretion, denied the appellant's contention insofar as the same related to interest, but did allow the appellant its taxable costs, which, together with its principal claim, have been fully paid.

Appellant may claim that the appellee is foreclosed from raising this question, by reason of its signing the stipulation as to contents of the apostles on appeal, which stipulation contained the following clause:

"The apostles on appeal may contain only such papers and proceedings as are necessary to review the question raised by the appeal of said Fireman's Fund Insurance Company, the same being,"

the particular papers set out in the stipulation, and contained in the apostles.

It is true that we signed this stipulation on behalf of appellee, as we considered that the papers therein mentioned were sufficient to raise the legal question sought to be reviewed by the appellant; but we certainly did not intend to stipulate, nor did such stipulation so state, that the bare pleadings set forth in said apostles are sufficient to lay the entire "circumstances" of the case before this court, so as to enable this court to determine therefrom as a *matter of fact* whether or not the lower court had abused its discretion.

The authorities are uniform that the allowance of costs and interest, in a collision case, are within the discretion of the trial court. The apostles are sufficient to raise this legal question. This being the only legal question before this court, we think that such authorities are conclusive on this appeal.

As to the question of fact contended for by appellant, we contend that the apostles in this case do not show that "circumstances of the case" sufficiently to enable this court to pass upon the same.

"We are without any means of knowing the circumstances in the pleadings or the evidence upon which the Court was called upon to act, except the bare facts stated in the findings of fact before referred to. The right to a limitation of liability seems to have been denied to the respondent from the beginning. If it offered to pay the value of the strippings into court in its discharge from liability, or desired to do so, it is evident that the Court would not allow

it to do so, and that libellants resisted it with all their power. The respondent was obliged to wait till the decision of this court in March, 1882, before getting a declaration of its rights in the matter; and the first move afterwards made was the attempt of the libellants to change the whole form of the controversy by setting up the new claim to the insurance money received by the respondent. Without stopping to decide whether this amendment of the proceedings was lawfully allowed after the decision of this court, it is sufficient to say that the Circuit Court, *so far as we have anything before us to show to the contrary, may have had very good reasons for not allowing interest* on the value of the strippings. We are not disposed to disturb its decree in this respect." (Italics ours.)

The Scotland, supra.

It was formerly considered that an appeal in an admiralty case was a trial *de novo* in the Circuit Court of Appeals, but in this circuit such does not now seem to be the rule.

"The Circuit Court of Appeals Act created a court which was entirely a court of review, and which did not execute its own decrees. Assignments of error were required, and the statute, and the general rules propounded for the Circuit Courts of Appeal by the Supreme Court, made no provision for new pleadings or new evidence. And so, in some of the circuits, an appeal in admiralty has not been regarded as a trial *de novo,* but as a review of the decree of the Court below on point of law only. The Ninth Circuit has held that findings of fact, made by the District Court on conflicting evidence, will not be disturbed on appeal, unless clearly contrary to the evidence, which holding is inconsistent with the idea that an appeal is a new trial, *Benedict on Admiralty,* 4th Ed. §566, citing:

"The Alijandro, 56 F. R. 621; *Whitney v. Olsen,* 108 F. R. 292; *Jacobsen v. Lewis Klondike Ex. Co.,*

112 F. R. 73; *Alaska Packers' Assn. v. Dominico,* 117 F. R. 99; *The Oscar B.,* 121 F. R. 978; *Paauhau, Etc. v. Palapala,* 127 F. R. 920."

It being the uniform holding of this court that it will not disturb a finding of the lower court, where the same is based upon conflicting evidence, certainly this court would not disturb a finding in the discretion of the lower court where none of the facts guiding or influencing the lower court in arriving at such finding are before this court.

This matter of the allowance of interest and costs to appellant and other "cargo claimants," was submitted to the lower court entirely on oral arguments and the court's decision rendered immediately after such oral arguments was given orally.

The Court's reasons for disallowing interest on this claim are therefore not before this court. As a matter of fact, the written decree disallowing interest was not entered until months later, or August 26, 1916, at which time appellant decided to prosecute this appeal and desired *some record* upon which to base an appeal.

If appellant desired to base its appeal on the question of fact, i. e., abuse of discretion by the lower court under all the "circumstances of the case," it was in its power to do so by bringing up the *entire* record in the case. This, however, would have involved an expense out of proportion to the amount of its claim. Having elected to stand on the legal question of the power

of the lower court to disallow interest on its claim, which is the only question raised on the apostles before this court, it must abide by its election.

The repeated statement in appellant's brief that it has been compelled to wait for over two years for the amount of its claim "admittedly due it" is not correct. The appellant's claim was not filed in this proceeding until January 27, 1915, or five months after the appellee filed its petition for limitation, and the liability of appellee as to this appellant alone was not determined until August 26, 1915, or approximately a year after the appellee filed its petition for limitation.

It will further be noted that the stipulation admitting liability as to appellant contemplates an agreement as to the amount of the appellant's claim, and that the amount of this claim was not agreed upon until June 12, 1916, upon which date a decree fixing the same was entered. Appellant was not compelled to litigate its claim, and the record shows that as soon as competent proof of the claim was furnished so that an agreement could be arrived at, such agreement was promptly made and a decree entered.

The only laches in connection with the establishment of this claim was upon the part of appellant.

It will further be noted that the claim as agreed upon is less than the claim asserted by appellant, so that if appellee had, as contended for by appellant,

been compelled to pay this claim when filed, it is apparent that appellee would have been compelled to pay more than appellant admitted, to have been due it.

We have been unable to find a single admiralty case where an appeal involving interest alone has been considered nor has appellant cited any such case. Where such a question is incidental to an appeal on the merits it has in rare cases been considered, and then only in a "clear case" of abuse of discretion by the lower court.

In the case at bar, "interest" is the only question involved; the allowance of interest being in the sound discretion of the lower court is not *per se* subject to review.

If this court should hold otherwise then we confidently assert that the record before this court does not disclose a "clear case" of abuse of discretion within the rule announced in the *Albert Demois, supra,* that

"The allowance of interest in admiralty cases is discretionary and not reviewable in this court except in a *very clear case.*"

We respectfully submit that the decree of the lower court should be affirmed.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellee, Canadian
Pacific Railway Company.

No. 2850

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),

Appellant,

vs.

CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," her engines, etc., PACIFIC ALASKA NAVIGATION COMPANY (a corporation), and ALASKA PACIFIC STEAMSHIP COMPANY (a corporation), claimants,

Appellees.

In the Matter of the Petition of the CANADIAN PACIFIC RAILWAY COMPANY (a corporation of the Dominion of Canada), owner of the Steamship "PRINCESS VICTORIA," for Limitation of Liability.

APPELLANT'S PETITION FOR A REHEARING.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Merchants Exchange Building, San Francisco,
Proctors for Appellant and Petitioner.

Filed this ..... *day of June, 1917.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Fireman's Fund Insurance Company, appellant herein, respectfully requests a rehearing in this cause because

the court has disposed of the appeal upon an erroneous assumption of fact, without apparently considering the matter on the merits.

The opinion of the court disposes of the appeal upon two grounds:

(1) Because in this court appellant contended for the allowance of interest from the date of the collision, whereas in the lower court interest was only claimed from the date of payment by appellant to its policy holders;

(2) Because payment by appellant to the cargo owners was made on June 12, 1916, from which date the lower court allowed interest.

(1.)

It is true that in this court we contended for the allowance of interest from the date of the collision, and that in the lower court interest was claimed only from the time of payment by appellant to the cargo owners, but that difference in time is so short that it becomes immaterial, and rather than further consider it we are willing to waive interest from the time of the collision to the date of actual payment by appellant to the cargo owners.

(2.)

This court, as its second reason for affirming the decree of the lower court, says:

> "When the appellant paid its insured the amounts for which it was liable, and thus became subrogated to the rights of the insured, is nowhere made to appear in the record; *but surely it could*

> *not have been prior to the time when its insured's loss was ascertained and fixed, which was July 12, 1916.''* (Italics ours.)

The court in that statement has fallen into error. Appellant had paid the cargo owners the amounts due each of them very shortly after the collision. The loss occurred on August 26, 1914, and appellant immediately commenced paying the losses of the cargo owners which it had insured. Most of these payments had been made by appellant within three weeks after the loss of the vessel and her cargo. All of the cargo owners which appellant had insured were paid by appellant within thirty days after the collision. These facts were and are known to appellee. All the cancelled checks, data and proofs necessary to convince it of the correctness of appellant's interests were submitted to appellee's proctors, and after careful consideration were agreed to as correct. This data and proof conclusively show when payments by appellant were made to the cargo owners. They do and will show that appellant has been deprived of the use of its money from approximately thirty days after the collision until the time appellee paid the principal sum admittedly due. Thus, it becomes apparent that from the latter part of September, 1914, until June 12, 1916, appellant, without any just cause, has been deprived of the use of its money and has been deprived of interest upon it for that period of time. Likewise it is apparent that appellee during the whole of this period (twenty-one months) has had the use and enjoyment of appellant's money, without paying any consideration therefor.

It is true that the record in this court does not disclose the exact day upon which the various cargo owners were paid by appellant, but certainly this court will not permit an immaterial omission of that kind to work a miscarriage of justice. Would not the more fair and equitable course for this court to take be to reverse the decree disallowing appellant interest for twenty-one months, with directions to allow appellant interest from the time it actually paid the various cargo owners whom it had insured? Then the dates upon which the cargo owners were paid, which information is in the hands of appellee, could be agreed to, and the universal rule in such cases—an allowance of interest upon the sums admittedly due innocent parties to a collision—would be applied. Certainly this court sitting in admiralty is not bound by any hard and fast rules of the technical common law. In hearing admiralty appeals, it is constantly striving to do equity between parties litigant, for it so stated in *California-Atlantic S. S. Co. v. Central Door & Lumber Co.,* 206 Fed. 5-7, in applying the settled rule,

> "in admiralty the court will determine cases upon equitable principles".

The answer filed by appellant in the court below (Apostles, p. 21), clearly negatives the court's finding that appellant paid the cargo owners, for the losses sustained by them, on June 12, 1916. It sets forth the names of the cargo owners insured by appellant and the amount paid to each of them. In that verified answer, prepared in 1914, it was, among other things, alleged:

> "* * * that by reason of said loss of said cargo it was compelled to pay, *and has paid,* the owners thereof, the full value of the same, * * *"

Thus the record does show that payments by appellant were made upon dates prior to the one which this court erroneously assumed they were made.

Furthermore, the parties expressly agreed to a hearing by this court, of the propriety of the action of Judge Neterer, on the record now on file (Apostles, p. 42). Certainly, the many canceled checks, vouchers and receipts showing the respective dates of payment should not be required in this court. They would only encumber the record. The answer filed in January, 1915, alleged that the cargo owners *had then been paid.* Furthermore, the appellee had definite knowledge of the actual dates of payment. None of that information, however, was material to a consideration by this court of the propriety of the action of the lower court.

The small record in this case contains all matters necessary to a proper determination of the question presented. No evidence is to be reviewed, no facts are to be considered. The pleadings alone might have been brought to this court. There are many parties interested and no good purpose would be served in making the record cumbersome by the addition of further pleadings or unnecessary matters. Nothing was before the lower court upon this question of interest that is not before this court. As the stipulation of the parties (Apostles, p. 32), indicates, the parties agreed to the amounts paid by each of the

underwriters, but there was no agreement as to an allowance of interest on those sums. Appellant and the other underwriters contended for the allowance of interest from the dates upon which payment by them to the cargo owners had been made, but appellee would not consent to its allowance. The matter was, therefore, reserved for the consideration of the court. After the matter had been presented to Judge Neterer, sitting in the lower court, he, without any apparent reason, arbitrarily disallowed appellant and the other underwriters interest from any date prior to June 12, 1916. By such action the lower court did not allow the measure of damage universally applied in similar cases. Appellant's right against appellee is for a *restitutio in integrum* and it should be placed in the same situation as it was in on the respective dates upon which it parted with the money on account of the collision for which appellee was responsible. The "just measure" in such cases, says the Supreme Court, referring to damages to a vessel and her cargo,

> "has been deemed to be their actual value, *together with interest upon the amount*, from the time of the trespass".
>
> *The Apollon,* 9 Wheaton 361, 6 L. ed. 111.

We feel confident that this court does not desire to depart from the rule uniformly applied in such cases. If there be merit in the contentions presented in our brief on file herein and to which we now, without again repeating them, refer the court, we submit that in all fairness this court should allow interest from the dates

upon which payment by appellant to the cargo owners was made. The dates upon which these sums were paid are not, as assumed by the court, on June 12, 1916, but twenty-one months previously thereto. It would, therefore, be a very simple matter to direct the lower court to allow interest upon the amount stipulated to as paid by appellant to the cargo owners from the dates upon which the payments were actually made. If appellant is entitled to interest, we most respectfully submit that it will be much more equitable to so direct the lower court than it will be to permit the present opinion of the court to stand, and particularly so in view of the fact that the opinion does not discuss the matter on the merits, but on the contrary disposes of the appeal upon an erroneous assumption of fact.

In this petition we have refrained from citing the authorities presented in our brief, but as they apparently have not been considered by the court, we most respectfully submit that our brief be again considered in connection with this petition.

Dated, San Francisco,
June 12, 1917.

Respectfully submitted,

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
BALLINGER, BATTLE, HULBERT & SHORTS,
Proctors for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

IRA A. CAMPBELL,
Of Counsel for Appellant and Petitioner.